TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 326.

RALPH B. JACOBS, PLAINTIFF IN ERROR,

vs.

SOUTHERN RAILWAY COMPANY.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

FILED JANUARY 16, 1915.

(24,517)

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1 **Copy.**

Supreme Court of Appeals of the State of Virginia.

RALPH B. JACOBS, Plaintiff,
v.
SOUTHERN RAILWAY COMPANY, a Corporation, Defendant.

Assignments of Error.

Now comes the above plaintiff, Ralph B. Jacobs, and files herewith his petition for a writ of error, and says that there are errors in the records and proceedings of the above entitled case, and for the purpose of having the same reviewed in the Supreme Court of the United States, makes the following assignments of error:

1. The Supreme Court of Appeals of the state of Virginia erred in holding and deciding by its judgment rendered on the 12th day of March, 1914, that the judgment of the circuit court of the county of Brunswick, rendered in favor of said plaintiff on the 24th day of April, 1913, against the said defendant, for the sum of $12,000.00, with interest thereon from the 5th day of March, 1913, and costs, be set aside and reversed, and that a new trial be awarded the said defendant.

The said plaintiff, as will appear from the transcript of the record and proceedings in said case, asserted the right to recover damages of the defendant in this case under and by virtue of the provisions of the act of Congress of the United States approved on the 22d day of April, 1908, and known as the Federal Employers' Liability Act (35 U. S. Stat. at L. 65, c. 149). The said plaintiff, therefore, claimed in this case rights, privileges and immunities under the laws of the United States, which were denied him by said decision and judgment of the said Supreme Court of Appeals of the state of Virginia.

The said errors in said judgment are more particularly set forth as follows:

2 (1-*a*) The said Supreme Court of Appeals erred in holding and deciding by the judgment aforesaid that the said circuit court of the county of Brunswick erred in giving to the jury, on the motion of the plaintiff, instruction No. 2 requested by the plaintiff, in the following words:

"The court further instructs the jury that knowledge by the plaintiff of the unsafe character or condition of the said roadway is of itself no defense to an action for injury caused to him thereby. Such knowledge, however, if the jury believe from the evidence that he had such knowledge, may be considered by the jury along with all the evidence in the case in determining whether the plaintiff was himself guilty of negligence, which contributed to produce the injury mentioned in the declaration; but the fact that the plaintiff may

himself have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of contributory negligence, if such there were, which they may believe from the evidence was attributable to said plaintiff under the circumstances."

(1-*b*) The said Supreme Court of Appeals erred in holding and deciding by the judgment aforesaid that the said circuit court of the county of Brunswick erred in refusing to give to the jury, on the motion of the defendant, instruction marked "A," requested by the defendant, in the following words:

"The court instructs the jury that if they believe from the evidence that the existence of the cinder pile was known to the plaintiff, or that he had been working on the Southern Railway at Lawrenceville for more than a year, and that the cinders had been piled at the same place in the way described by the witnesses for many years prior to the accident, and that the plaintiff had failed to show that he had made complaint or objection on account of the cinder pile, then he assumed the risk of danger from the cinder pile, if there was any danger in it, and the Act of Congress approved April 22, 1908, permits this defense, and the jury should find their verdict for the defendant."

(1-*c*) The said Supreme Court of Appeals erred in reversing, setting aside and annulling the said judgment of the said circuit court in favor of the plaintiff, upon the ground, alleged by the said Supreme Court of Appeals, that the said circuit court erred in giving to the jury said instruction No. 2.

The plaintiff avers that there was no error in that ruling and judgment of the said circuit court.

(1-*d*) The said Supreme Court of Appeals erred in reversing, setting aside and annulling the said judgment of the said circuit
3 court in favor of the plaintiff, upon the ground, alleged by the said Supreme Court of Appeals, that the said circuit court erred in refusing to give to the jury said instruction marked "A."

The plaintiff avers that there was no error in that ruling and judgment of the said circuit court.

2. The said Supreme Court of Appeals erred in refusing, by its judgment rendered on the 10th day of November, 1914, to award the said plaintiff a writ of error and supersedeas to the final judgment of the said circuit court rendered on the 3d day of September, 1914, in favor of the said defendant, on the second trial of said case, which was had pursuant to the judgment aforesaid of the said Supreme Court of Appeals rendered on the said 12th day of March, 1914, the effect of which refusal to award the said plaintiff a writ of error and supersedeas was to affirm the said judgment of the said circuit court rendered in favor of the said defendant on the 3d day of September, 1914.

The errors in the said last mentioned judgment are more particularly set forth as follows:

(2-*a*) The said Supreme Court of Appeals erred in affirming the ruling and judgment of the said circuit court in refusing to give to

the jury, on the said second trial, instruction No. 3, requested by the said plaintiff in the following words:

"If the jury believe from the evidence that the officers, agents and employes of the defendant, or any of them, negligently caused, suffered or permitted the pile of cinders mentioned in the declaration to be placed, and to be, remain and accumulate upon and alongside the main line of its railway track or roadbed upon its railroad yard at the town of Lawrenceville, in dangerous proximity to the said railroad track, and that the plaintiff suffered the injury mentioned in the declaration, and that such injury resulted in whole or in part from the negligence of the said officers, agents and employes of the said defendant, or any of them, in either negligently causing, suffering or permitting the said pile of cinders to be placed, and to be, remain and accumulate, upon and alongside the said railroad track or roadbed as aforesaid, they should find for the plaintiff."

This instruction, the plaintiff submits, correctly states the law in so far as the first section of the said act of Congress makes the negligence of any of the officers, agents or employes of the defendant the basis of recovery for an injury resulting in whole or in part
4 from such negligence; and the said circuit court erred in refusing to give said instruction to the jury.

(2-*b*) The said Supreme Court of Appeals erred in affirming the ruling and judgment of the said circuit court in refusing to give to the jury on the said second trial, instruction No. 4, requested by the plaintiff in the following words:

"If the jury believe from the evidence that the defendant, through its officers, agents and employes, or any of them, negligently caused, suffered or permitted the pile of cinders mentioned in the declaration to be placed, and to be, remain and accumulate upon and alongside the main line of its railway track or roadbed, upon its railroad yard at the town of Lawrenceville, in dangerous proximity to the said railroad track or roadbed, and that said pile of cinders constituted a defect or insufficiency in said railroad track or roadbed of the said defendant, due to the negligence of the said defendant, and that the plaintiff suffered the injury mentioned in the declaration, and that such injury resulted in whole or in part from such defect or insufficiency in the said railroad track or roadbed, due to the negligence of the said defendant as aforesaid in so negligently causing, suffering or permitting the said pile of cinders to be placed and to be, remain and accumulate upon and alongside the said railroad track or roadbed as aforesaid, they should find for the plaintiff."

This instruction, the plaintiff submits, correctly states the law in so far as the first section of said act of Congress makes any defect or insufficiency in the railroad track or roadbed of the said defendant, due to the negligence of the defendant, the basis of recovery for injury resulting in whole or in part from such defect or insufficiency; and the said circuit court erred in refusing to give said instruction to the jury.

(2-*c*) The said Supreme Court of Appeals erred in affirming the ruling and judgment of the said circuit court in refusing to give to

the jury on the said second trial, instruction No. 5, requested by the plaintiff, in the following words:

"The fact that the plaintiff may have had knowledge of the existence of the pile of cinders mentioned in the declaration is not a bar to an action for injury caused to him thereby. Such knowledge, however, if the jury believe from the evidence that he had such knowledge, may be considered by the jury along with all the evidence in the case in determining whether the plaintiff was himself guilty of negligence, which contributed to produce the injury mentioned in the declaration; but the fact that the plaintiff may himself have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of contributory negligence, if such there were, which the jury may believe from the evidence was attributable to the said plaintiff under the circumstances."

5 This instruction, the plaintiff submits, correctly states the law under said act of Congress with respect to the extent to which the plaintiff's knowledge of the existence of the pile of cinders affects his right of recovery for the injury sustained by him, and resulting in whole or in part from the negligence of the officers, agents or employes of the defendant, or from any defect or insufficiency due to its negligence in its railroad track or roadbed; and the said circuit court erred in refusing to give said instruction to the jury.

(2-*d*) The said Supreme Court of Appeals erred in affirming the ruling and judgment of the said circuit court in refusing to give to the jury on the said second trial, instruction No. 6, requested by the plaintiff, in the following words:

"In order to charge the plaintiff with contributory negligence which the jury are to consider in mitigation of damages, the jury must believe from the evidence not only that the plaintiff knew of the existence of the pile of cinders, but also that the danger occasioned by the said pile of cinders was known to him, or was so obvious that a man of ordinary prudence would have appreciated such danger, and not have attempted as the plaintiff did to get upon the engine at the time and under the circumstances disclosed by the evidence."

This instruction, the plaintiff submits, correctly states the law with respect to the doctrine of contributory negligence as applicable to this case; and the said circuit court erred in refusing to give said instruction to the jury.

(2-*e*) The said Supreme Court of Appeals erred in affirming the ruling and judgment of the said circuit court in giving to the jury the said instruction marked "A", hereinabove set forth.

The plaintiff submits that the said circuit court erred in giving said instruction marked "A" to the jury, for these two reasons:

First. That the common-law defense of assumption of risk is not an available defense in bar of recovery for any liability created and imposed by the first section of the act of Congress; and

Second. That said instruction marked "A" does not correctly state the common-law defense of assumption of risk.

(2-*f*) The said Supreme Court of Appeals erred in affirming the

ruling and judgment of the said circuit court in refusing to
6 set aside the verdict of the jury rendered in favor of the defendant on the said second trial had on the 3d day of September, 1914, as aforesaid, upon the ground that the said verdict is contrary to the law and the evidence; which ruling and judgment of the said circuit court was also error.

The plaintiff submits that every fact necessary to entitle him to recover is established by the evidence in the case.

(2-*g*) The said Supreme Court of Appeals erred in affirming the ruling and judgment of the said circuit court in refusing to set aside the verdict of the jury rendered in favor of the defendant on the said second trial, had on the said 3d day of September, 1914, as aforesaid, and award the plaintiff a new trial, upon the ground that the said circuit court erred in refusing to give to the jury the said instructions numbered 3, 4, 5 and 6, requested by the plaintiff, as hereinbefore set forth; which ruling and judgment of the said circuit court was also error.

(2-*h*) The said Supreme Court of Appeals erred in affirming the ruling and judgment of the said circuit court in refusing to set aside the verdict of the jury, rendered in favor of the defendant at the said second trial, had on the said 3d day of September, 1914, as aforesaid, and award the plaintiff a new trial, upon the ground that the said circuit court erred in giving to the jury the said instruction marked "A", requested by the defendant, and hereinbefore set forth; which ruling and judgment of the said circuit court was also error.

3. The said Supreme Court of Appeals erred in reversing by its judgment aforesaid, rendered on the 12th day of March, 1914, the judgment of the said circuit court rendered as aforesaid in favor of the plaintiff on the 24th day of April, 1913.

Under the law and evidence as it appears in the record in this case in the said circuit court and in the said Supreme Court of Appeals of Virginia, the plaintiff was plainly entitled to recover the damages awarded him by the verdict of the jury on the first trial of the case in the said circuit court, to-wit: $12,000.00, with interest from
the 5th day of March, 1913, the date of the verdict, and his
7 costs, for the following reasons:

(1) The defendant was at the time the plaintiff received the injury a common carrier by railroad engaging in interstate commerce;

(2) The plaintiff was then and there a person employed by said defendant in such commerce within the intendment of the said act of Congress;

(3) The injury, to-wit: the loss of his right leg, sustained by the plaintiff resulted in whole or in part from:

(*a*) The negligence of the officers, agents and employes of the defendant; and

(*b*) by reason of a defect or insufficiency due to the negligence of the defendant in its track and roadbed on its yard at Lawrenceville, consisting of a pile of loose cinders which had been suffered to accumulate alongside its track.

(4) The plaintiff had not assumed the risk (*a*) of such negli-

gence of the said officers, agents and employes, nor (*b*) of the said defect or insufficiency, inasmuch as under the said act of Congress:

(*a*) an employe can be held to have assumed only the normal "risks of his employment"; the secondary risks superadded thereto by the negligence of the defendant, or of its officers, agents or employes, and not assumed by the plaintiff, the statute imposing liability upon the defendant for an injury to the plaintiff resulting in whole or in part from any defect or insufficiency in its track or roadbed, due to the negligence of the defendant, or from the negligence of any of its officers, agents or employes, which liability is absolute;

(*b*) the principle of the assumption of risk of the employer's negligence is a principle of the common-law of England and of such of the states as may have adopted it; but the said common-law principle is no part of a distinctive federal system of jurisprudence;

(*c*) in the absence of express adoption by Congress of the common-law principle of assumption of risk of the employer's negligence, the said principle does not ex proprio vigore apply as
8 a rule of decision in courts administering the law of the United States, and the said principle as applied by the courts of the United States is recognized by such courts only as an emanation from the states which have not by constitution or statute abolished the principle; and

(*d*) the common-law principle of assumption of risk had been abolished in the state of Virginia before the plaintiff's cause of action arose, by virtue of section 162 of the constitution of the state, as well as by statute (Code of Virginia, section 1294-*k*).

(5) Even at common-law, the plaintiff did not assume the risk of the danger created by the said pile of cinders, because:

(*a*) the evidence shows that he had knowledge only of the existence of the cinder pile, but not of the resulting danger; and such knowledge of the condition only does not at common-law charge him with assumption of risk;

(*b*) at most, the plaintiff is chargeable with contributory negligence only, which under said act of Congress is not a bar to recovery, and the effect of which as the basis for mitigation of damages was properly submitted to the jury by instructions given by the said circuit court.

4. For the reasons stated in support of the fourth assignment of error, the said Supreme Court of Appeals erred in refusing by its judgment rendered on the 10th day of November, 1914, to award the plaintiff a writ of error and supersedeas to the judgment of the said circuit court rendered on the 3d day of September, 1914, in favor of the defendant, and in thereby affirming the said last mentioned judgment.

5. The plaintiff avers that the final judgment of the said circuit court rendered in favor of the defendant on the 3d day of November, 1914, is erroneous in all the particulars set forth in the foregoing assignments of error with respect to the judgment of the said Supreme Court of Appeals rendered on the 10th day of November, 1914, by which said judgment of the circuit court was affirmed; and the said plaintiff prays that, so far as it may be necessary under the

practice of the said Supreme Court of the United States for him to assign errors in said judgment of the circuit court, the fore-
9 going assignments of error in the said last mentioned judgment of the said Supreme Court of Appeals may be taken and treated as assignments of error also in the said judgment of the said circuit court.

For which errors the plaintiff, Ralph B. Jacobs, prays:

1. That the said judgment of the said Supreme Court of Appeals of the state of Virginia, rendered on the 12th day of March, 1914, may be reviewed, reversed and annulled; and that a judgment may be rendered in favor of the said plaintiff for $12,000.00, the damages awarded him by the jury on the first trial of this case, with interest thereon from the 5th day of March, 1913, and for costs; and that all proceedings in this case in the said circuit court and in the said Supreme Court of Appeals subsequent to the said judgment of the said Supreme Court of Appeals rendered on the said 12th day of March, 1914, may also be reviewed, reversed and annulled;

2. That the final judgment of the circuit court of the county of Brunswick, rendered in favor of the defendant, on the second trial of this case as aforesaid, on the 3d day of September, 1914, as well as the final judgment of the said Supreme Court of Appeals rendered on the 10th day of November, 1914, affirming said last mentioned judgment of said circuit court may be reviewed, reversed and annulled; and that a judgment may be rendered in favor of the plaintiff awarding him a new trial, if in the opinion of the said Supreme Court of the United States a new trial be necessary to attain the ends of justice, and for costs; and

3. That all such other and further relief as may be proper in the premises may be granted.

EDWARD P. BUFORD,
Attorney for the Plaintiff Ralph B. Jacobs.

10 [Endorsed:] Ralph B. Jacobs vs. Southern Railway Company. Assignments of error. Buford, Lewis & Peterson, Attorneys at Law, Lawrenceville, Virginia.

11 Supreme Court of Appeals of the State of Virginia.

RALPH B. JACOBS, Plaintiff,
vs.
SOUTHERN RAILWAY COMPANY, a Corporation, Defendant.

Petition for Writ of Error.

To the Honorable James Keith, President of the Supreme Court of Appeals of the State of Virginia:

Considering himself aggrieved by the final judgment of the Supreme Court of Appeals of the state of Virginia, in rendering judgment against him in the above entitled case, the plaintiff, Ralph B. Jacobs, hereby prays a writ of error from the said decision and judg-

ment to the Supreme Court of the United States; the said Supreme Court of Appeals of the state of Virginia being the highest court of law or equity in said state in which a judgment can be had in said case. Assignments of error herewith.

EDWARD P. BUFORD,
Attorney for the Plaintiff, Ralph B. Jacobs.

STATE OF VIRGINIA,
Supreme Court of Appeals, ss:

Let the writ issue upon execution of a bond by the plaintiff, Ralph B. Jacobs, to the defendant, the Southern Railway Company, a corporation, in the sum of $300.00.; said bond when approved to act as a supersedeas.

Dated, December *Dec.* 22nd, 1914.

JAMES KEITH,
President of the Supreme Court of Appeals of the State of Virginia.

12 [Endorsed:] Ralph B. Jacobs, vs. Southern Railway Company. Petition for writ of error, and Order granting writ. Buford, Lewis & Peterson, Attorneys at Law, Lawrenceville, Virginia.

13 Copy.

Supreme Court of the United States.

No. —.

RALPH B. JACOBS, Plaintiff,
vs.
SOUTHERN RAILWAY COMPANY, a Corporation, Defendant.

Bond.

Know all men by these presents, That we, Ralph B. Jacobs, as principal, and W. T. Sledge and W. A. Trotter, as sureties, are held and firmly bound unto the Southern Railway Company, a corporation, in the sum of Three Hundred dollars ($300.00.), to be paid to the said Southern Railway Company, to which payment, well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals, and dated this 21st day of December, 1914.

Whereas, the above-named plaintiff in error seeks to prosecute his writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of Appeals of the state of Virginia,

Now, therefore, The condition of this obligation is such, that if the above-named plaintiff in error shall prosecute his said writ of error to effect, and answer all costs and damages that may be ad-

judged if he shall fail to make good his plea, then this obligation to be void, otherwise to remain in full force and effect.

RALPH B. JACOBS. [SEAL.]
W. T. SLEDGE. [SEAL.]
W. A. TROTTER. [SEAL.]

STATE OF VIRGINIA,
County of Brunswick, ss:

W. T. Sledge and W. A. Trotter, being each duly sworn, on oath depose and say: We are each of lawful age and are citizens of the state of Virginia, and know the contents of the foregoing instrument to which we have attached our names. We each for himself
14 say we are worth the sum of Three hundred dollars ($300.00.) over and above all debts, liabilities and exemptions.

W. T. SLEDGE.
W. A. TROTTER.

Subscribed and sworn to before me, this 21st day of December, 1914.

[Seal J. R. Owens, Notary Public, Brunswick Co., Va.]

J. R. OWENS,
Notary Public.

(My Commission expires December 11, 1915.)

The above bond is approved.
JAMES KEITH,
President of the Supreme Court of Appeals of the State of Virginia.

The original of the foregoing supersedeas bond was lodged with the clerk of the Supreme Court of Appeals of Virginia on December 22, 1914, and the following endorsement made thereon. Bond received and filed December 22, 1914.

H. STEWART JONES,
Clerk Supreme Court of Appeals of Virginia.

15 [Endorsed:] Supreme Court of the United States. No. —. Ralph B. Jacobs, vs. Southern Railway Company. Bond. Buford, Lewis & Peterson, Attorneys at Law, Lawrenceville, Virginia.

16 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of Appeals of the State of Virginia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said supreme court of appeals of the state of Virginia, before you, or some of you, being the

highest court of law or equity of the said state in which a decision could be had in the said suit between Ralph B. Jacobs and the Southern Railway Company, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of such, their validity; or wherein was drawn in question the construction of a clause of the constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Ralph B. Jacobs, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the supreme court of the United States, together with this writ, so that you have the same at Washington on the 18th day of January, 1915, in the said supreme court, to be then and there held,
17 that, the record and proceedings aforesaid being inspected, the said supreme court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Edward D. White, Chief Justice of the said supreme court, the 23rd day of December, in the year of our Lord 1914.

[Seal United States District Court, Eastern District of Virginia.]

JOSEPH P. BRADY,
Clerk of the United States District Court for the Eastern District of Virginia.

Allowed by
JAMES KEITH,
President of the Supreme Court of Appeals of the State of Virginia.

The original of the foregoing writ of error was lodged with the Clerk of the Supreme Court of Appeals of the State of Virginia on December 23, 1914, and also at the same time and place a copy thereof for the Southern Railway Company. The following endorsement was made upon the original writ and upon the copy. Writ of error Filed, December 23, 1914.

H. STEWART JONES,
Clerk Supreme Court of Appeals of Virginia.

Legal service of the foregoing writ of error is hereby accepted,

SOUTHERN RAILWAY COMPANY,
By WILLIAM LEIGH WILLIAMS,
Its Attorney.

December 26, 1914.

18 [Endorsed:] Writ of error filed December 23, 1914, H. Stewart Jones, Clerk Supreme Court of Appeals of Virginia.

19 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Southern Railway Company, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of Appeals of the State of Virginia, wherein Ralph B. Jacobs is plaintiff in error and you are the defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the President of the Supreme Court of Appeals of the State of Virginia, this the 23rd day of December, 1914.

JAMES KEITH,
President Court of Appeals of the State of Virginia.

[Seal Supreme Court of Appeals of Virginia, Richmond.]

Attest:

H. STEWART JONES,
Clerk of the Supreme Court of Appeals of the State of Virginia.

Legal service of the foregoing citation is hereby accepted.
December 26, 1914.

SOUTHERN RAILWAY COMPANY,
By WILLIAM LEIGH WILLIAMS,
Its Attorney.

20 *Return to Writ.*

UNITED STATES OF AMERICA,
Supreme Court of Appeals of Virginia, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix

the seal of the said Supreme Court of Appeals of Virginia, in the City of Richmond, this 7th day of January, 1915.

[Seal Supreme Court of Appeals of Virginia, Richmond.]

____ ____,

Clerk of the Supreme Court of Appeals of Virginia.

Costs of transcript, $73.64, paid by E. P. Buford.

____ ____,

Clerk of the Supreme Court of Appeals of Virginia.

The attorneys of record in the case are as follows:
E. P. Buford, Lawrenceville, Virginia, for plaintiff in error.
Wm. Leigh Williams, Norfolk, Virginia, for defendant in error.

21 Form 1474.

Southern Railway Company,
Law Department.

NORFOLK, VA., January 1st, 1915.

RALPH B. JACOBS
vs.
SOUTHERN RY. CO.

H. Stewart Jones, Esq., Clerk Court of Appeals, Richmond, Va.

DEAR SIR: I desire to acknowledge due notice of an application on the part of Ralph B. Jacobs for a copy of the record in the above entitled case, with a view to carrying the case from the Supreme Court of Virginia to the Supreme Court of the United States.

Yours very truly,

W. L. WILLIAMS,
Ass't Division Counsel for Southern Ry. Co.

22 In the Supreme Court of Appeals of Virginia, at Richmond.

SOUTHERN RAILWAY COMPANY
v.
RALPH B. JACOBS.

To the Honorable Judges of the Supreme Court of Appeals of Virginia:

Your petitioner, Southern Railway Company, a corporation organized and existing by and under the laws of the State of Virginia, respectfully showeth unto your honors that it is aggrieved by the judgment of the Circuit Court of Brunswick County, Virginia, entered on the 24th day of April, 1913, in favor of Ralph B. Jacobs and against your petitioner, for the sum of Twelve Thousand

($12,000.00) Dollars with interest thereon from the 5th day of March, 1913, and costs.

A transcript of the record in said case is herewith presented.

This is an action seeking to recover damages for personal injury, brought under the Act of Congress known as the "Employers' Liability Act," which was approved April 22, 1908. The material parts of this act, so far as this controversy is concerned, are sections 1, 3 and 4, which sections, for the convenience of the Court, are here quoted:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every
23 common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States and Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

SEC. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this Act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

SEC. 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this Act to recover damages for injuries to or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

This Act was amended by an Act of Congress approved April 5, 1910, but the amendments are not material to this controversy.

24 All of the evidence adduced both for the plaintiff and the defendant will be found set out in the transcript, Record pp. 22 to 101, inclusive, constituting Bill of Exceptions No. 1.

On Record p. 100, it will be seen that after the jury found their verdict for the plaintiff the defendant moved the court to set aside the verdict of the jury as contrary to the law and the evidence, and for misdirection of the jury, and for failure to instruct the jury as requested by the defendant, and for errors of the court in rejecting evidence offered by the defendant, and in admitting evidence over the objection of the defendant, and because the verdict was excessive, and the rights of the defendant under the Act of Congress under which this action was brought had been denied; and that this motion was continued to a subsequent term, and at the April Term, 1913, this motion was overruled, and a new trial was refused by the court below, which action and ruling of the court is now assigned as error.

On Record pp. 102-104, inclusive, will be found the instructions asked for by the plaintiff, all of which were given. Instruction No. 1 sets out in substance that it was the duty of the Railway Company to use ordinary care to maintain and keep its railroad tracks and roadbed in a reasonably safe condition. To the giving of this instruction the defendant in proper time excepted, and now assigns the action and ruling of the court in giving this instruction as error. The objection to this instruction is that there was no evidence in the case showing any failure on the part of the defendant company to keep its roadbed in a reasonably safe, condition.

Instruction No. 2, found on Record p. 102, was given over the objection of the Railway Company, and this action of the court is assigned as error. This instruction reads as follows:

"The court further instructs the jury that knowledge by the plaintiff of the unsafe character or condition of the said roadbed is of itself no defense to an action for injury caused to him thereby. Such knowledge, however, if the jury believe from the evidence that he had such knowledge, may be considered by the jury along with all the evidence in the case, in determining whether the plaintiff was himself guilty of negligence, which contributed to pro-
25 duce the injury mentioned in the declaration; but the fact that the plaintiff may himself have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of contributory negligence, if such there were, which they may believe from the evidence was attributable to said plaintiff under the circumstances."

This instruction is open to the objection that at one and the same time it undertakes to apply to the case the law of Virginia as laid down in Sec. 162 of its Constitution, and also the law as declared by the Act of Congress above recited. Furthermore, the instruction blends and confounds the doctrine of assumption of risk and the doctrine of contributory negligence in hopeless confusion, treating them apparently as if they were the same, although they are two very distinct propositions, and dealt with by the Act of Congress in different ways. The instruction is the converse of the instructions asked for by the defendant, and will be discussed more at length in connection with the instructions asked for by the Railway Company.

Instruction No. 3 granted for the plaintiff below, found on Record p. 103, was given over the objection of the Railway Company, and this action of the court is assigned as error. The objection to this instruction is that it absolutely ignores all of the defenses of the defendant below, and furthermore, ignores the fact that at the time of the accident none of the cars being moved were loaded with interstate freight, in whole or in part, nor were any of the cars in that movement destined to any point beyond the State of Virginia, nor was the contents of any of the said cars destined to any point beyond the State of Virginia. The instruction is the converse of an instruction asked for by the Railway Company, and the objection will be elaborated further on.

On Record p. 105 it will be found that the Railway Company asked the court to give the following instruction, marked "A":

"The Court instructs the jury that if they believe from the evidence that the existence of the cinder pile was known to the plaintiff, or that he had been working on the Southern Rail-
26 way at Lawrenceville for more than a year and that the cinders had been piled at the same place in the way described by the witnesses for many years prior to the accident, and that the plaintiff had failed to show that he had made complaint or objection on account of the cinder pile, then he assumed the risk of danger from the cinder pile, if there was any danger in it, and the Act of Congress approved April 22, 1908, permits this defense, and the jury should find their verdict for the defendant."

The Court refused to give this instruction and the Railway Company excepted, and now assigns this action and ruling of the Court as error.

By reference to Record p. 69, and the following pages, and Record p. 74, it will be seen that the plaintiff below had been working for the Railway Company at Lawrenceville for about eighteen months before the accident, and was entirely familiar with the practice and habit of the company of piling the cinders along the track from time to time at the point where the passenger trains blew out the ash pans. The undisputed evidence in the case shows that this had been the practice and habit of the company for many years, and that the plaintiff, Jacobs, was entirely familiar with this practice and habit. It is assumed that the court below refused to give this instruction upon the ground that the doctrine of assumption of risk has been abolished in the State of Virginia. It is said in the case of Schlemmer v. Buffalo, &c., Co., 220 U. S. 590; 55 L. Ed. 600, as follows:

"While, as was said in the case when here before, assumption of risk sometimes shades into negligence as commonly understood, there is, nevertheless, a practical and clear distinction between the two. In the absence of statute taking away the defense, or such obvious dangers that no ordinarily prudent person would incur them an employee is held to assume the risk of the ordinary dangers of the occupation into which he is about to enter, and also those risks and dangers which are known, or are so plainly observable that the employee may be presumed to know of them, and if he continues in

the master's employ without objection, he takes upon himself the risk of injury from such defects. Choctaw, O. & G. R. Co. v.
27 McDade, 191 U. S. 64, 67, 68; 48 L. Ed. 96, 100, 101, 24 Sup. Ct. Rep. 24, and former cases in this court therein cited.

Contributory negligence, on the other hand, is the omission of the employee to use those precautions for his own safety which ordinary prudence requires. (See, in this connection, Narramore v. Cleveland, C. C. & St. L. R. Co., 48 L. R. A. 68; 37 C. C. A. 499, 509, 96 Fed. 298).

See also N. & W. R. R. Co. v. Cheatwood, 103 Va. 368.

It is respectfully submitted that if the doctrine of assumption of risk, as above set out, applies at all, it is a perfect defense under the evidence in this case, and the instruction should have been given, provided that doctrine is a defense under the Act of Congress under which the suit was brought.

Referring again to the act under which the suit is brought, Sec. 4 reads as follows:

"That in any action brought against any common carrier under or by virtue of any of the provisions of this Act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

By the terms of the act itself assumption of risk is declared not to be a defense when the negligence complained of is violation of some statute enacted for the safety of employees. The construction put upon this act by the Court below was that the defense had been entirely abolished. Such a construction reads out of the Act entirely Section 4, for if the doctrine had been abolished absolutely and in all cases, why should Section 4 be inserted saying that it should be deemed to be abolished in a certain particular case, to-wit: when there had been violation of some statute enacted for the safety of employees, etc.? The fair and reasonable construction of the Act is to construe it as meaning what it says, namely, that the assumption of risk is abolished only where the negligence is in viola-
28 tion of some statute enacted for the safety of employees. We respectfully submit that the Act of Congress above referred to is the exclusive substantive law governing cases of this character; that Congress having spoken within its constitutional powers on this subject, all State laws, so far as they are matters of substance and right, yield to the law as declared by Congress; that one of the main objects of the law was to produce uniformity in these cases throughout all of the United States and its Territories and the District of Columbia. Any other construction would only add to the already great confusion which existed prior to the passage of the Act. We would still have as many different State laws governing these cases as there are States.

This question came before the Supreme Court of Idaho in the case

of Neil v. Idaho, 125 Pac. 341, and it was there said, referring to the Act of Congress approved April 22, 1908:

"The provisions of section 4 of said Act of Congress do not remove the defense of assumption of risk unless the injury or death of the employee was contributed to by the violation on the part of the common carrier of any statute enacted for the safety of the employees."

It matters not what is the law of Virginia in this connection. The sole inquiry is, What does the Act of Congress mean in this respect? In the case of Michigan Central R. R. Co. v. Vreeland, decided January 20, 1913, in the Supreme Court of the United States, in speaking of this very act it is said by the Court, speaking through Mr. Justice Lurton, as follows:

"We may not piece out this act of Congress by resorting to the local statutes of the state of procedure or that of the injury. The act is one which relates to the liability of railroad companies engaged in interstate commerce to their employees while engaged in such commerce. The power of Congress to deal with the subject comes from its power to regulate commerce between the states.

Prior to this act Congress had not deemed it expedient to
29 legislate upon the subject, though its power was ample. 'The subject,' as observed by this court in Second Employers' Liability Cases (Mondou v. New York N. Y. & H. R. Co.), 223 U. S. 1; 54, 56 L. Ed. 327, 347; 38 L. R. A. (N. S.) 44, 32 Sup. Ct. Rep. 169, 'is one which falls within the police power of the state in the absence of regulation by Congress.' By this act Congress has undertaken to cover the subject of the liability of railroad companies to their employees injured while engaged in interstate commerce. This exertion of a power which is granted in express terms must supersede all legislation over the same subject by the states."

Again in the same case it is said:

"The statutes of many of the states expressly provide for the survival of the right of action which the injured person might have prosecuted if he had survived. But unless this Federal statute which declares the liability here asserted provides that the right of action shall survive the death of the injured employee, it does not pass to his representative, notwithstanding state legislation."

Again, in the case of Seaboard Air Line v. Moore, decided by the Supreme Court of the United States April 28, 1913, opinion by Chief Justice White, it is said:

"Based upon a statement made in the opinion of the Court below to the effect that the case of Mondou v. New York, 223 U. S. 1, was decisive of the constitutionality and applicability to the case of the Employers' Liability Law, and, moreover, disposed of a number of contentions urged in the assignments of error filed below, it is pressed upon our attention that the court decided and erred in deciding that the Employers' Liability Law abolished, as to all cases coming under its provisions, the defense of assumption of risk, and, also, that a railroad employee injured in the course of his employment could avail of the benefits of the statute although at the time he sus-

tained the injury he was not actually engaged in interstate commerce. But we think it is plain that the contentions last stated are without merit * * *. It is unnecessary to recur to the text of the opinion to demonstrate the conclusion just stated, because in any event the contentions must be overruled, since the benefit of the
30 defense of assumption of risk was accorded to the railway company at the trial and the right of the plaintiff to recover was made dependent upon his establishing that at the time he was injured he was actually engaged in interstate commerce."

It is perfectly clear from the opinion in this case that the doctrine of assumption of risk was regarded as obtaining, and put before the jury by the lower court, and the Supreme Court of the United States says that this was right. In the case at bar the court below distinctly declined to permit this defense to be put forward by the railroad company, on the theory that it had been abolished by the laws of Virginia.

Again the Supreme Court of the United States, in the case of Gulf, &c., Co. v. McGinnis, decided April 7, 1913, in discussing the act now under discussion, says:

"It has also been assigned as error that the defense of assumed risk was, in legal effect, denied, because the court overruled a motion to instruct a verdict for the defendant. The defense of assumed risk was submitted to the jury under a full and fair general charge."

From an examination of the original record of the Supreme Court of the United States, the full and fair general charge above referred to was, in part, as follows:

"(3) An employee of a railroad company is held in law to assume such risks as are ordinarily incident to the service he engages to perform, and such others as he knows of or must necessarily have known of in the ordinary discharge of the duties of his service; but risks arising from the negligence of the company's servants or employees that are chargeable to it are not assumed by an employee, unless he knows of them or must necessarily have known of them in the ordinary discharge of the duties of his service."

Again in the case of American R. Co. v. Birch, 224 U. S. 544; 56 L. Ed. 879, in discussing this Act the Court says through Mr. Justice McKenna, as follows:

"Section 3 includes (excludes?) the defense of contributory negligence, but requires the damages to be 'diminished by the
31 jury in proportion to the amount of negligence attributable to such employee.' But provides that contributory negligence is not to be attributable to the employee injured or killed 'where the violation by such common carrier of a statute enacted for the safety of employees contributed to the injury or death of such employee.' And by Sec. 4, assumption of risk by the employee is also excluded in such case."

There would be no sense in the Court saying that assumption of risk is excluded in such case if it was excluded in all cases.

In the case of Mondou v. New York, &c., Co., 123 U. S., in dis-

cussing the act now under construction, the Court said at p. 54 (56 L. Ed. 348):

"True, prior to the present act, the laws of the several states were regarded as determinative of the liability of employers engaged in interstate commerce for injuries received by their employees while engaged in such commerce. But that was because Congress, although empowered to regulate that subject, had not acted thereon, and because the subject is one which falls within the police power of the states in the absence of action by Congress." (Citation of cases.) "The inaction of Congress, however, in no wise affected its power over the subject." (Citation of cases.) "And now that Congress has acted, the laws of the states, in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is."

The Supreme Court of Georgia has distinctly held that the defense of assumption of risk was not abolished by the Act of Congress except in cases where the servant was injured through the violation by the master of some statute enacted for the safety of employees. See Bowers v. Southern Ry. Co., 73 S. E. 679.

Assumption of risk is a good defense to an action under the Federal Employers' Liability Act, except when the carrier's default consists in a violation of some statute enacted for the safety of employees, and such default has contributed to the injury or death of the employee in question. Barker v. Kansas City, &c., Co., 129 Pac. 1151.

32 This court is also referred to the case of Freeman v. Powell, 144 S. W. 1034.

It is submitted that this case is on all fours with the case at bar. The plaintiff was engaged in interstate commerce, and was injured through failure of the Railway Company to furnish proper appliances. The court, in discussing the case, says:

"In the absence of a statute affecting the rule, we think it is not to be doubted from the unquestioned facts that appellee did assume the risk. See Mt. Marion Coal Mining Co. v. Holt, 118 S. W. 825; Choctaw v. McDade, 191 U. S. 64. But it is insisted that the Court's conclusion to the contrary is correct, because of the act of the legislature of the State of Texas approved April 24, 1905."

The court then gives at length the Texas statute which was construed by the court below to abolish the doctrine of assumed risk with reference to the case before it. Afterwards the court proceeds:

"If the above act applies, the court's findings have some support in the evidence; but we are of the opinion that the rights of the parties are to be determined by the provisions of the act of April 22, 1908, passed by the Congress of the United States."

The court then proceeds to give the act of Congress, and then says:

"It thus appears that under the federal statute a complaining employee to whom the act applies is not relieved from the operation of the ordinary rule of assumed risk, except in cases where there is a violation by the carrier of some statute enacted for the safety of an employee which has contributed to his injury or death, and of this

there is no contention in this suit. In the respect just noted, the act of Congress conflicts with the state's statute which we have quoted. The power of Congress over interstate commerce is not an open question, and it extends to all agencies and instrumentalities by or through which it is carried on."

33 The court then proceeds to cite a number of authorities, and then says:

"It seems to us that the authorities hereinbefore cited are conclusive to the effect that the subject of interstate commerce has been committed to the national law making power, and that when this power has been exercised it is supreme, and excludes any state legislation on the subject."

The court refused to give instruction marked "B" asked for by the defendant, which will be found on Record p. 105, and this action of the court is assigned as error.

This instruction simply sought to have the jury instructed to the effect that it was incumbent on the plaintiff to show that in allowing the cinders to pile up from time to time as shown by the evidence, the Railway Company was acting in a manner different from the way in which other reasonable and well managed railway companies acted under similar circumstances and conditions. The court is referred to the case of Bertha Zinc Co. v. Martin, 93 Va. 807.

Instruction "D." found on Record p. 106, asked the court to instruct the jury that the act of Congress now under consideration did not apply to switching movements. This instruction the court refused and this action of the court is assigned as error.

Instruction "E." found on Record p. 107, instructed the jury that if they believed from the evidence that the cars being moved at the time of the accident were cars destined to points within the State of Virginia, and moving from Lawrenceville, Virginia, that then they should find for the defendant. This the court refused, and this action of the court is assigned as error. In connection with the refusal of the court to give this instruction, the court is referred to the following cases:

The plaintiff was building a track upon a bridge which was used by the defendant in both kinds of commerce, and was struck on another track by a train engaged in intrastate commerce. Held that the statute did not apply.

34 Pendersen v. Delaware, &c., Co., 197 Fed. 540.

A bridge repairer being struck while repairing a bridge engaged in interstate commerce, held not to be within the act. Taylor v. Southern Ry. Co., 178 Fed. 380.

The car which plaintiff was trying to set out was engaged in intrastate business, though there were other cars in the train engaged in interstate commerce. Held that the act did not apply. Van Brimmer v. Texas, 190 Fed. 397.

The undisputed evidence very clearly shows that at the time of the accident the train was moving only two cars, namely, Southern 136532 and N. Y. P. & N. 1352, which were intended to be, and which were, carried out on this train, and that both of these cars

were intended for points within the State of Virginia, and there was no evidence that any of the contents of these cars originated from points without the State of Virginia. Now, it is absolutely necessary, in order to bring the case of the plaintiff below under the statute, to show that both the plaintiff and the defendant were at the time of the accident engaged in interstate commerce.

The court below was asked to set aside the verdict upon the ground that the verdict was excessive. The act of Congress under which this action was brought declares that the jury shall diminish the damages in proportion to the contributory negligence of the plaintiff in the action. Now the undisputed evidence in this case shows that this plaintiff attempted to board a moving engine without notifying the engineer, with a water cooler in his arms, and at a place where he knew cinders had been piled off and on ever since he had been working for the company, and this too in broad open daylight and when there was no necessity for his boarding the engine at that particular time, as it was making a switching movement and necessarily would have to stop and come back after the switching movement had been completed.

For the errors above assigned in refusing to set aside the said verdict, and in entering judgment thereon, and in instructing the jury as above set out, and in refusing to instruct the jury as requested by the Railway Company as above set out, your petitioner prays for a writ of error and supersedeas, and that the said judgment may be reviewed and reversed, and your petitioner will ever pray, etc.

35

SOUTHERN RAILWAY COMPANY,
By W. L. WILLIAMS.

I, William Leigh Williams, an attorney and counsellor at law of the Supreme Court of Appeals of Virginia, do hereby certify that in my opinion it is proper that the decision in the above entitled case be reviewed and reversed by this honorable court.

WILLIAM LEIGH WILLIAMS.

Received June 12, 1913.

JAMES KEITH.

Writ of error and supersedeas awarded. Bond $15,000.

JAMES KEITH.

VIRGINIA:

Pleas at the Court House of the County of Brunswick Before the Circuit Court of said County, on the 23rd Day of April, 1913.

Be it remembered, that heretofore, to-wit: at rules held at the clerk's office of said Circuit Court, on the first Monday in August, 1912, came Ralph B. Jacobs, plaintiff by his attorneys, and filed his declaration against the Southern Railway Company, which declaration is in the following words:

"VIRGINIA:

In the Circuit Court of Brunswick County.

Second Rules in July, 1912.

"Ralph B. Jacobs, Plaintiff, complains of the Southern Railway Company, a corporation, Defendant, of a plea of trespass on the case, for this, to-wit:

36 That before and at the time of committing the wrongs and grievances hereinafter mentioned, the said defendant had been and was a corporation, operating a railroad in the State of Virginia, to-wit: a railroad from the City of Norfolk to the City of Danville, in the said State, and passing through the County of Brunswick and the Town of Lawrenceville, in the said county; upon, along and over which said railroad, the said defendant ran, hauled and operated trains of cars, by means of locomotive engines, propelled by steam, for the transportation of passengers and freight, in its business which it then and there conducted and carried on as a common carrier of passengers and freight.

And the said defendant, as such common carrier of passengers and freight, was, at the time of committing the said wrongs and grievances, engaging in certain commerce, commonly called interstate commerce, to-wit: certain commerce between certain of the several states, to-wit: certain commerce between certain of the several territories, to-wit: certain commerce between certain of the states and certain of the territories, to-wit: certain commerce between the District of Columbia and certain of the states, to-wit: certain commerce between the District of Columbia and certain of the territories, to-wit: certain commerce between the District of Columbia and a certain foreign nation or certain foreign nations, to-wit: certain commerce between certain of the states and a certain foreign nation or certain foreign nations, to-wit: certain commerce between certain of the territories and a certain foreign nation or certain foreign nations, within the meaning, purview and intendment of that certain Act of Congress of the United States of America, entitled "An Act Relating to the Liability of Common Carriers by Railroad to their Employes in Certain Cases," which was approved on April 2, 1908.

And the said defendant, for the purpose of carrying on and conducting its business and the commerce aforesaid, then and there hired and had in its service, divers employes and servants, to-wit: locomotive engineers, firemen and other employes, engaged in the physical operation of its trains, cars and engines, in service requiring their presence upon its trains, cars and engines and in charge of its locomotive engines. And the said defendant, as such pro-

37 prietor of the said railroad, maintained also in connection with its said railroad a certain railroad yard at the said town of Lawrenceville, in the said county, in connection with the main line of its said railroad, upon which said railroad yard it maintained and operated sundry side tracks and switch tracks, for the purpose of operating and shifting its engines, trains and cars, and of loading

and unloading freight and of receiving and discharging passengers, and of coupling and uncoupling its engines, cars and trains, and of making up its trains on the said railroad tracks, on its said yard; which said railroad yard was a scene of ceaseless activity, and, in order to carry on their work and promptly discharge their duties to the said defendant, it became and was necessary for the employes and servants of the said defendant engaged in and about it- service aforesaid, to exercise a careful economy of time, and, as far as possible, utilize every moment of time in the service of the said defendant, and it was necessary, customary and usual for the said servants and employes of the said defendant engaged by it in and about the duties and services aforesaid, to board and get upon the engines of the said defendant while moving at a slow rate of speed upon the said yard, of all which the said defendant had knowledge, and acquiesced in and approved thereof.

And the said defendant, being such proprietor of and operating said railroad, locomotive engines and trains of cars and maintaining and operating said railroad yard and the said tracks and switch tracks on said yard, for the purpose of conducting its business and the commerce aforesaid, and being the employer of such servants and employes as aforesaid, heretofore, to-wit: on the 19th day of August, 1911, and for a long space of time, to-wit: one year before that day, the said plaintiff, at the special instance and request of the said defendant, had become and was an employe and servant of the said defendant, engaged and employed by the said defendant in the capacity, and for the purpose of performing the duties, of a fireman on a certain one of the freight trains of the said defendant, to-wit: a freight train sometimes designated as train Number 62, and consisting of a certain locomotive engine and tender and divers freight and box cars; and as such employe and fireman of the said
38 defendant, it became and was the duty of the said plaintiff, in obedience to the rules, orders and requirements of the said defendant, to aid and assist in the shifting of the said engine, cars and train of cars, of the said defendant and in making up the said train on the railroad yard aforesaid, and in the running and operating of its said freight train on its railroad aforesaid. And the said plaintiff, being such servant, employe and fireman of the said defendant, was, at the time of suffering the injury hereinafter mentioned a person employed by the said defendant in such commerce, to-wit: in the interstate commerce aforesaid, within the meaning, purview and intendment of the Act of Congress aforesaid, and was engaged in the service of the said defendant requiring his presence on its trains, cars and engines. And the said plaintiff is entitled to the benefit of the provisions of said Act of Congress.

And thereupon it became and was the duty of the said defendant, through its agents, servants and employes, other than the said plaintiff, engaged in another department of the service of the said defendant, to use ordinary care to provide and maintain reasonably safe railroad tracks, roadbeds, places and ways upon, along and over which the said plaintiff was required to perform for the said defendant the duties and services aforesaid. And the said plaintiff avers

that the said defendant, not regarding its said duty in that behalf, carelessly and negligently wholly failed and omitted to perform the same, and, at the time of, and for a long space of time, to-wit: thirty days before, inflicting the injury upon the plaintiff hereinafter mentioned, the said defendant, through its agents, servants and employes, other than the plaintiff, last above mentioned, to-wit: its agents, servants and employes engaged in another department of its service from that in which the plaintiff was then and there engaged, carelessly and negligently caused, suffered and permitted a large pile of loose cinders and ashes to be placed, and to be, remain and accumulate, upon and alongside the main line of its said railroad track, and roadbed upon the said railroad yard, at the said town of Lawrenceville, in dangerous proximity to the said railroad track, to-wit: a pile of loose cinders and ashes one (1) foot high, seven (7) feet wide, and thirty (30) feet long, which, from its nature was reasonably liable, and might reasonably have been expected by the said defendant, to cause the servants and employes of the said
39 defendant engaged in performing the duties and services required of the plaintiff as aforesaid, to stumble, fall and be injured in the manner in which the plaintiff was caused to stumble, fall and be injured as hereinafter alleged, of all which the said defendant then and there had notice.

And the said plaintiff avers that heretofore, to-wit: on the said 19th day of August, 1911, while engaged in the performance of the duties and services required of him by the said defendant as such fireman as aforesaid, and while the said defendant was engaging in the said commerce, to-wit: in the interstate commerce aforesaid and hereinbefore described, and while the said plaintiff was so employed by the said defendant in such commerce aforesaid, within the meaning, purview and intendment of the Act of Congress aforesaid, the said plaintiff, at the said railroad yard, at the said town of Lawrenceville, in the performance of his duties and services as such fireman as aforesaid, and in the usual and customary manner, known to, acquiesced in and approved of by the said defendant as aforesaid, attempted to board and go upon the said engine and into the cab thereof, while the said engine was moving at a slow rate of speed, to-wit: at the rate of not more than four (4) miles an hour, for the purpose of performing on said engine the duties required of him as such fireman in the running, shifting and operating of said engine and train of cars; and while he was so attempting to board and get upon said engine as aforesaid, the said plaintiff came into contact with the said pile of loose cinders and ashes, which the said defendant had negligently caused, suffered and permitted, to be and remain in close and dangerous proximity to its said railroad track as aforesaid, and the said plaintiff was caused by the said pile of loose cinders and ashes to stumble and fall and to slip and be pulled and thrown down, and under the said engine and train, and then and there, while the said plaintiff was so thrown down and in a prostrate and helpless condition and before he could extricate himself from his position of danger, the wheel or wheels of the said engine and train of cars ran over, and so severely broke, crushed and mangled, the

right lef of the said plaintiff that his said right leg had to be amputated.

And the said plaintiff avers that the act of the said plain-
40 tiff in so attempting to board and get upon the said engine, while it was in motion as aforesaid, was done by the said plaintiff in accordance with the usual and customary practice on the part of himself and other employes of the said defendant, with the knowledge, acquiescence and approval of the said defendant, and in accordance with the necessity, recognized and approved by the said defendant, for economizing and utilizing every moment of time in the operation of its trains upon the said yard, and could have been accomplished by the said plaintiff without danger or risk of injury to himself but for the carelessness and negligence of the said defendant in failing and omitting to perform its duty aforesaid; and the said plaintiff avers that when attempting to board and get upon the said engine as aforesaid, he had no knowledge of the dangerous condition of the said place and way, caused by the negligence of the defendant aforesaid, or of the danger and risk of injury to which he was thereby exposed, and that he was exercising ordinary care and precaution for his own safety, while attempting to board and get upon the said engine.

And by means of the premises, the said plaintiff became and was greatly bruised, hurt and wounded, sick, sore, lame and disordered, and so remained during all that time, suffered and underwent great pain and was hindered from transacting his lawful business by him and continued for a long space of time, to-wit: hitherto, and during that time to be done, performed and transacted, and has been permanently maimed and disabled in and deprived of the use of his said right leg, and has been caused to suffer and endure great mental and bodily pain and anguish, and was thereby also obliged to pay and expend, and did necessarily pay and expend divers sums of money, in the whole amounting to a large sum of money, to-wit: the sum of $100.00, in and about endeavoring to be cured of the sickness, soreness, lameness and disorder aforesaid, received as aforesaid, and other wrongs to the said plaintiff, the said defendant then and there did. To the Damage of the said plaintiff Twenty Thousand ($20,000.00) Dollars.

And for this also, to-wit: That before and at the time of committing the wrongs and grievances hereinafter mentioned, the
41 said defendant had been and was a corporation, operating a railroad in the State of Virginia, to-wit: a railroad from the City of Norfolk to the City of Danville, in the said State, and passing through the County of Brunswick and the Town of Lawrenceville, in the said county; upon, along and over which said railroad, the said defendant ran, hauled and operated trains of cars, by means of locomotive engines, propelled by steam, for the transportation of passengers and freight, in its business which it then and there conducted and carried on as a common carrier of passengers and freight.

And the said defendant, as such common carrier of passengers and freight, was, at the time of committing the said wrongs and grievances, engaging in certain commerce, commonly called interstate

commerce, to-wit: certain commerce between certain of the several states, to-wit: certain commerce between certain of the several territories, to-wit: certain commerce between certain of the states and certain of the territories, to-wit: certain commerce between the District of Columbia and certain of the states, to-wit: certain commerce between the District of Columbia and certain of the territories, to-wit: certain commerce between the District of Columbia and a certain foreign nation or certain foreign nations, to-wit: certain commerce between certain of the states and a certain foreign nation or certain foreign nations, to-wit: certain commerce between certain of the territories and a certain foreign nation or certain foreign nations, within the meaning, purview and intendment of that certain Act of Congress of the United States of America, entitled "An Act Relating to the Liability of Common Carriers by Railroad to their Employes in Certain Cases," which was approved on April 22, 1908.

And the said defendant, for the purpose of carrying on and conducting its business and the commerce aforesaid, then and there hired and had in its service, divers employes and servants, to-wit: locomotive engineers, firemen and other employes, engaged in the physical operation of its trains, cars and engines, in service requiring their presence upon its trains, cars and engines, and in charge of its locomotive engines. And the said defendant, as such pro-
42 prietor of the said railroad, maintained also in connection with its said railroad a certain railroad yard at the said town of Lawrenceville, in the said county, in connection with the main line of its said railroad, upon which said railroad yard it maintained and operated sundry side tracks and switch tracks, for the purpose of operating and shifting its engines, trains and cars, and of loading and unloading freight and of receiving and discharging passengers, and of coupling and uncoupling its engines, cars and trains, and of making up its trains on the said railroad tracks, on its said yard; which said railroad yard was a scene of ceaseless activity, and, in order to carry on their work and promptly discharge their duties to the said defendant, it became and was necessary for the employes and servants of said defendant engaged in and about its service aforesaid, to exercise a careful economy of time, and, as far as possible, utilize every moment of time in the service of the said defendant, and it was necessary, customary and usual for the said servants and employes of the said defendant engaged by it in and about the duties and services aforesaid, to board and get upon the engines of the said defendant while moving at a slow rate of speed upon the said yard, of all which the said defendant had knowledge, and acquiesced in and approved thereof.

And the said defendant, being such proprietor of and operating said railroad, locomotive engines and trains of cars and maintaining and operating said railroad yard and the side tracks and switch tracks on said yard, for the purpose of conducting its business and the commerce aforesaid, and being the employer of such servants and employes as aforesaid, heretofore, to-wit: on the 19th day of August, 1911, and for a long space of time, to-wit: one year before that day, the said plaintiff, at the special instance and request of the said defendant, had become and was an employe and servant of the said

defendant, engaged and employed by the said defendant in the capacity, and for the purpose of performing the duties, of a fireman on a certain one of the freight trains of the said defendant, to-wit: a freight train sometimes designated as train Number 62, and consisting of a certain locomotive engine and tender and divers
43 freight and box cars: and as such employe and fireman of the said defendant, it became and was the duty of the said plaintiff, in obedience to the rules, orders and requirements of the said defendant, to aid and assist in the shifting of the said engine, cars and train of cars of the said defendant and in making up the said train on the railroad yard aforesaid, and in the running and operating of its said freight train on its railroad aforesaid. And the said plaintiff, being such servant, employe and fireman of the said defendant, was, at the time of suffering the injury hereinafter mentioned, a person employed by the said defendant in such commerce, to-wit: in th- interstate commerce aforesaid, within the meaning, purview and intendment of the Act of Congress aforesaid, and was engaged in the service of the said defendant requiring his presence on its trains, cars and engines. And as an incident to the service in which the plaintiff was so engaged as aforesaid, it became and was necessary for the said plaintiff to secure, provide and carry into the cab of said engine a sufficient supply of drinking water for himself and the engineer in charge of said engine, while in the discharge of their duties in running and operating the said engine and train, to-wit: from the said town of Lawrenceville, to the said City of Norfolk. And the said plaintiff is entitled to the benefit of the provisions of said Act of Congress. And thereupon it became and was the duty of the said defendant, through its agents, servants and employes, other than the said plaintiff, engaged in another department of the service of the said defendant, to use ordinary care to provide and maintain reasonably safe railroad tracks, roadbeds, places and ways upon, along and over, which the said plaintiff was required to perform for the said defendant the duties and services aforesaid. And the said plaintiff avers that the said defendant, not regarding its said duty in that behalf, carelessly and negligently wholly failed and omitted to perform the same, and at the time of, and for a long space of time, to-wit: thirty days before, inflicting the injury upon the plaintiff hereinafter mentioned, the said defendant, through its agents, servants and employes, other than the plaintiff, last above mentioned, to-wit: its agents, servants and employes engaged in another department of its service from that in which the plaintiff was then and there engaged, carelessly and negligently caused,
44 suffered and permitted, a large pile of loose cinders and ashes to be placed, and to be, remain and accumulate, upon and alongside the main line of its said railroad track, and road bed, upon the said railroad yard, at the said town of Lawrenceville, in dangerous proximity to the said railroad track, to-wit: a pile of loose cinders and ashes one (1) foot high, seven (7) feet wide, and thirty (30) feet long, which from its nature was reasonably liable, and might reasonably have been expected by the said defendant, to cause the servants and employes of the said defendant engaged in performing the duties and services required of the plaintiff as aforesaid, to

stumble, fall and be injured in the manner in which the plaintiff was caused to stumble, fall and be injured as hereinafter alleged, of all which the said defendant then and there had notice.

And the said plaintiff avers that heretofore, to-wit: on the said 19th day of August, 1911, while engaged in the performance of the duties and services required of him by the said defendant as such fireman as aforesaid, and while the said defendant was engaging in the said commerce, to-wit: in the interstate commerce aforesaid and hereinbefore described, and while the said plaintiff was so employed by the said defendant in such commerce aforesaid, within the meaning, purview and intendment of the Act of Congress aforesaid, the said plaintiff, at the said railroad yard, at the said town of Lawrenceville, in the performance of his duties and services as such fireman as aforesaid, and in the usual and customary manner, known to, acquiesced in and approved of by the said defendant as aforesaid, having secured and supplied himself with a can or cooler of drinking water for the use of himself and the engineer as aforesaid, and having said can or cooler of water in his hand, attempted to board and get upon the said engine and into the cab thereof, while the said engine was moving at a slow rate of speed, to-wit: at the rate of not more than four (4) miles an hour, for the purpose of performing on said engine the duties required of him as such fireman in the running, shifting and operating, of said engine and train of cars; and while he was so attempting to board and get upon said engine as aforesaid, the said plaintiff came into contact with the said pile of loose cinders and ashes, which the said defendant had negligently caused, suffered and permitted to be and remain in close and dangerous proximity to its said railroad track as aforesaid, and the said plaintiff was caused by the said pile of loose cinders and ashes to stumble and fall and to slip and be pulled and thrown down and under the said engine and train, and then and there, while the said plaintiff was so thrown down and in a prostrate and helpless condition and before he could extricate himself from his position of danger, the wheel or wheels of the said engine and train of cars ran over, and so severely broke, crushed and mangled, the right leg of the said plaintiff that his said right leg had to be amputated.

And the said plaintiff avers that the act of the said plaintiff in so attempting to board and get upon the said engine, while it was in motion as aforesaid, was done by the said plaintiff in accordance with the usual and customary practice on the part of himself and other employes of the said defendant, with the knowledge, acquiescence and approval, of the said defendant, and in accordance with the necessity, recognized and approved by the said defendant, for economizing and utilizing every moment of time in the operation of its trains upon the said yard, and could have been accomplished by the said plaintiff without danger or risk of injury to himself but for the carelessness and negligence of the said defendant in failing and omitting to perform its duty aforesaid; and the said plaintiff avers that when attempting to board and get upon the said engine as aforesaid, he had no knowledge of the dangerous condition of the said place and way, caused by the negligence of the defendant aforesaid,

or of the danger and risk of injury to which he was thereby exposed, and that he was exercising ordinary care and precaution for his own safety, while attempting to board and get upon the said engine.

And by means of the premises, the said plaintiff became and was greatly bruised, hurt and wounded, sick, sore, lame and disordered, and so remained and continued for a long space of time, to-wit: hitherto, and during all that time, suffered and underwent great pain and was hindered from transacting his lawful business
46 by him during that time to be done, performed and transacted, and has been permanently maimed and disabled in and deprived of the use of his said right leg, and has been caused to suffer and endure great mental and bodily pain and anguish, and was thereby also obliged to pay and expend, and did necessarily pay and expend divers sums of money, in the whole amounting to a large sum of money, to wit: the sum of $100.00, in and about endeavoring to be cured of the sickness, soreness, lameness and disorder aforesaid, received as aforesaid, and other wrongs to the said plaintiff, the said defendant then and there did. To the damage of the said plaintiff Twenty Thousand ($20,000.00) Dollars.

And therefore he brings his suit.

BUFORD, LEWIS & PETERSON, *p. q.*"

And at another day, to-wit: At a Circuit Court held for the County of Brunswick, on Tuesday, the third day of September, 1912, the following order was entered:

"This day came the parties by their attorneys, respectively, and the defendant moved the Court to quash the interrogatories heretofore propounded by the plaintiff to the defendant Company, which motion was argued by Counsel.

And the Court having heard the argument of counsel doth sustain the said motion, and it is ordered that the interrogatories be quashed, to which action of the Court the plaintiff then and there excepted, and tendered to the Court his first bill of exceptions, which was thereupon signed, sealed and enrolled and made a part of this record.

Thereupon the defendant pleaded not guilty in which issue the plaintiff joined.

And thereupon the defendant moved the Court to require the plaintiff to file the particulars of his claim within fifteen days from the rising of this Court, and that the defendant file its grounds of defense within fifteen days thereafter, which was accordingly ordered.

By consent of parties by counsel, this case is continued
47 until the next term of this Court and is set for trial on the 24th day of October, 1912."

And, at another day, to-wit: At a Circuit Court continued and held for the County aforesaid, on Tuesday, the fourth day of March, 1913, the following order was entered:

"This day came the parties by their attorneys. And thereupon came a jury, to-wit: Miles Taylor, J. S. Jones, John W. Matthews,

L. H. Raney, Huff Harris, W. E. Smith and T. B. Reams, who were selected, impannelled, and sworn in manner provided by law, and having fully heard the evidence, are adjourned until to-morrow morning at ten o'clock.

And the further hearing of this case is continued until to-morrow morning at ten o'clock."

And, at another day, to-wit: At a Circuit Court continued and held for the County aforesaid, on Wednesday, the 5th day of March, 1913, the following order was entered:

"This day came again the parties by their attorneys, and the jury sworn on yesterday appeared in court, in pursuance of their ajournment, and having heard the argument of counsel, retired to their room to consider of their verdict, and after a short while, returned in court and reported a verdict in these words: "We, the Jury, find for the plaintiff, and assess his damages at $12,000.00. W. E. Smith, Foreman."

And thereupon the defendant, by counsel, moved the court to set aside the verdict of the jury, and grant it a new trial upon the grounds that the verdict is contrary to the law and the evidence, and for misdirection of the jury, and for failure to instruct the jury as requested by the defendant, and for errors of the court in rejecting evidence offered by the defendant, and in admitting evidence over the objection of the defendant, and because the verdict is excessive and the rights of the defendant under the act of Congress under which the action is brought have been denied, and for other errors appearing on the face of the record. And the court not being advised of its judgment upon said motion, doth continue the same for argument and decision until the next term of this court."

48 And, now at this day, to-wit: At a Circuit Court held for the County aforesaid, on Tuesday, the 24th day of April, 1913, the following order was entered:

"This day came again the parties, plaintiff and defendant, by counsel, and the court having duly considered the motion of the defendant, and the grounds thereof, which was made at the February Term, 1913, and the hearing of which was continued to this term, to set aside the verdict of the jury and grant it a new trial doth overrule said motion and decline to set aside the said verdict, and to grant the defendant a new trial. And the defendant, by counsel, noted an exception to the ruling of the court in refusing to set aside the verdict and grant to it a new trial; and thereupon it is considered by the court that the plaintiff do recover of the defendant the sum of Twelve Thousand Dollars, with interest thereon from the 5th day of March, 1913, and his costs by him in this behalf expended.

And thereupon the defendant presented in open Court its several Bills of Exception numbered 1 and 2, which having been signed and sealed by the Judge of this Court, now, on motion of counsel for the defendant, it is ordered that the said several bills of exception be and they hereby are made a part of the record in this case. And

on motion of the defendant, by counsel, the said judgment of the court is suspended for ninety days from the rising of the court, upon the execution by the defendant or someone for it, before the Clerk of this Court, with security to be approved by him, of a bond in the penalty of Fifteen Thousand ($15,000.00) Dollars conditioned as provided by law, in order to enable the defendant to present a petition to the Supreme Court of Appeals for a writ of error and supersedeas in this case.

And it is further ordered by the court that the bill of particulars of the plaintiff and of the grounds of defense of the defendant be now filed nunc pro tunc, the same by consent of the plaintiff and defendant to be considered as having been filed in apt time."

Which Bill of Particulars of the plaintiff and of the Grounds of Defense of the defendant are in the following words:

49 *Bill of Particulars.*

"The plaintiff sets forth the following particulars of his claim in addition to the facts and claims set forth in his declaration:

1. That the injury to the plaintiff alleged in the declaration occurred on the yard of the defendant at the town of Lawrenceville, in the county of Brunswick, State of Virginia, at a certain place on the track of the said defendant, near the depot of said defendant, and eastward thereof.

2. That the freight train designated as freight train numbered 62 in said declaration, at the time of the said injury and then and there being made up and shifted preparatory to setting out and as incident to setting out on said run, embraced among other interstate shipments within the meaning of said Act of Congress, contained the following shipments, to wit:

a. Shipments of merchandise from a certain place, to-wit: Spencer, in the State of North Carolina, to certain points in the State of Virginia, to-wit: stations along the line of the division of said defendant's railway from the town of Lawrenceville, aforesaid, to Pinners Point, Virginia, inclusive, which shipments were contained in a certain car designated as New York, Philadelphia and Norfolk or N. Y. P. & N., number 1352.

b. Shipments of merchandise from a certain place, to-wit Oxford, in the State of North Carolina, to Emporia, in the State of Virginia; shipments of merchandise, to-wit: a box of clothing, from Drake's Branch, in the State of Virginia, to the city of New York, in the State of New York, and shipments of merchandise, to-wit: four tierces of tobacco, from Chase City, in the State of Virginia, to the city of Philadelphia, in the State of Pennsylvania, which shipments were contained in a certain car designated as Southern car, number 30790.

c. That at the time of said injury, the said train contained other shipments of interstate commerce within the meaning of the said Act of Congress.

50 3. That the said defendant at the time of the said injury as respects the Norfolk and Danville division of its said

railway, on which said injury occurred, was engaged in interstate commerce within the meaning of the Act of Congress aforesaid, and the said plaintiff was at the time of said injury employed by the said defendant in such interstate commerce, the said division of said railway being partly in the State of Virginia and partly in the State of North Carolina, and the function of said freight train number 62 being to haul and transport from the town of Lawrenceville, Virginia, thence eastward to Pinners Point in said State, by means of freight cars operated by said defendant, shipments of freight from places without the State of Virginia, brought to the said town of Lawrenceville by the said defendant, and shipments of freight originating in said State of Virginia west of the said town of Lawrenceville, and destined to places in other states and territories outside of the State of Virginia, and to be hauled by means of said freight train from the said town of Lawrenceville in pursuance of said interstate transportation; and that one of the functions of the said train as appointed by said defendant, was to haul and transport all interstate shipments originating at any point between Lawrenceville, Virginia, and Pinners Point, Virginia, and that at a certain station east of the said town of Lawrenceville on said railway, to-wit: at Emporia station and at Suffolk station, both in the State of Virginia, shipments of merchandise and freight on the day on which said injury occurred, were received at said stations and loaded upon said train destined to points outside of the State of Virginia, and were by means of said train conveyed for transportation and delivery to other transportation companies in transit to said destinations.

BUFORD, LEWIS & PETERSON,
Attorneys for Plaintiff."

Grounds of Defense.

"Pursuant to an order heretofore entered in this cause, the defendant, by its attorney, files this its Grounds of Defense.

51 The Southern Railway Company, the defendant above named, relies upon the pleas heretofore filed in this cause, and for further defense says that each and every allegation of the declaration, and each count thereof, is untrue, and that neither the plaintiff nor the defendant at the time of the accident complained of in the declaration was engaged in interstate commerce, but, on the contrary, were engaged in intrastate commerce; that the said plaintiff was guilty of gross contributory negligence in attempting to board the engine with a water cooler filled with water in his arms, and was also guilty of gross contributory negligence in attempting to board the engine from a pile of cinders along the track; and was also guilty of gross contributory negligence in running along the track and in attempting to board the engine without looking and seeing the pile of cinders, which could have been observed with any caution and care on his part; that the said pile of cinders had been allowed to accumulate in the same manner and in the same place as they were at the time of the accident for many years prior to the accident, and that these facts were well known to the plaintiff, and

that he assumed the risk of danger from said pile of cinders, if there was any danger in allowing them to remain there.

Respectfully submitted,

W. L. WILLIAMS,
TURNBULL & TURNBULL, *p. d.*"

Bill of Exceptions No. 1.

Be it remembered that on the trial of this cause, the plaintiff and defendant, respectively, introduced, to maintain the issues on their part, the following testimony:

In the Circuit Court of Brunswick County, Virginia.

R. B. JACOBS
v.
SOUTHERN RAILWAY COMPANY.

52 *Testimony.*

Before Hon. J. F. West and Jury.

LAWRENCEVILLE, VIRGINIA, March 4, 1913.

Present: Messrs. Buford, Lewis & Peterson, for the plaintiff; Messrs. W. L. Williams and Turnbull & Turnbull, for the defendant.

D. S. Phlegar, Shorthand Reporter, Norfolk, Virginia.

E. W. LIGON, on behalf of the plaintiff, being duly sworn, testified as follows:

Examined by Mr. BUFORD:

Q. Mr. Ligon, what position do you hold?
A. Agent for the Southern Railway, at Lawrenceville.
Q. Agent for the Southern Railway Company at Lawrenceville?
A. Yes, sir.
Q. Tell the court and jury how the train, the freight train made up here on the morning of the 19th of August, 1911, is designated?
A. It is known as train 62.
Q. What is the run of that train?
A. From Lawrenceville to Pinners Point.
Q. What was that train composed of?

Mr. WILLIAMS: Now, may it please your Honor, I object unless he knows by independent memory, unless he has a memorandum made by himself from which he could give that information.

The COURT: I suppose that he has reference to whether freight train or passenger.

Mr. WILLIAMS: He said what composed it, and I suppose he meant the names and number of cars.

53 Mr. BUFORD: Yes.

Mr. WILLIAMS: This occurred on the 19th of August, 1911, a considerable length of time back. I say any witness can only testify by having independent recollection, or having some memorandum made at the time, by which he can refresh his memory.

The COURT: The position seems sound.

Mr. BUFORD: I assume that he is going to speak with reference to his records.

Mr. WILLIAMS: I then ask for the production of the record.

By Mr. BUFORD:

Q. Answer my question, Mr. Ligon, from records, if you have them.

A. (Witness examines the records.)

Mr. WILLIAMS: Will you permit me to ask him whether he made that record himself?

The COURT: Yes.

By Mr. WILLIAMS:

Q. Did you make that record yourself, Mr. Ligon?

A. No, sir.

Mr. WILLIAMS: I say that he cannot refresh his memory from it.

By the COURT:

Q. Who made the record, if you know?

A. The consist of the train was made by the operator on duty at that time, and checked by the conductor as to what particular cars he moved.

By Mr. BUFORD:

Q. By the operator—one of the agents of the company?

A. He was in the employ of the company.

Q. Is that the regular record of the Southern Railway Company?

54 A. Yes, sir.

Q. Is that what the Southern Railway Company, and all its officers, rely upon as showing what was the train on that date?

A. That is what we use at the office.

Q. Is that the record produced from the office at Lawrenceville?

A. Yes, sir.

Q. That is a part of the record of your office, is it?

A. Yes, sir.

Q. Who was the man who actually made that record?

A. I could not tell now, Mr. Buford, unless I examine my time sheet to see who worked that day, as I do not recognize the handwriting.

Q. Have they been in the possession of the company, at Lawrenceville, all this time?

A. Yes, sir.

Q. Will they be returned by you to the company, and be kept as a part of the records of the office here?
A. Yes, sir.
Q. Are they under your control, as agent of the company?
A. Yes, sir.
Q. You say the conductor in charge of the train checked that list, and his check shows what cars actually went into his train?
A. Yes, sir.
Q. Who was that conductor?
A. Conductor Renfrow.
Q. Is Mr. Renfrow's signature on there?
A. No, sir.

By Mr. BUFORD: We will call Mr. Renfrow to the stand just now to identify the record.

R. G. RENFROW, on behalf of the plaintiff, being duly sworn, testifies as follows:

Examined by Mr. BUFORD:

Q. Mr. Renfrow, will you look at that list, please, sir, and say whether—are you the conductor of train No. 62?
A. Yes, sir.
55 Q. Were you the conductor on the 19th day of August, 1911?
A. Yes, sir.
Q. The morning on which Mr. Jacobs received his injury?
A. Yes, sir.
Q. Did you check that list of cars?
A. Yes, sir.
Q. Are those the cars that composed the train?
A. Yes, sir.
Q. And the train on which Mr. Jacobs was serving as fireman?
A. Yes, sir.
Q. What cars then composed the train?
A. Those that have my cross mark in this line down here.
Q. Will you please read them out, and give the name and number?
A. Southern 10753; A. C. L. 29093; N. Y. P. & N. 1352; Southern 133479; Southern 30790; Southern 11956; Southern 136532.

E. W. LIGON, takes the stand for further examination.

By Mr. BUFORD:

Q. Will you tell the jury now, Mr. Ligon, by reference to your records, how those cars, just mentioned by Mr. Renfrow, came to Lawrenceville, and when they were brought here?

Mr. WILLIAMS: Now, may it please your Honor, I desire to object to any inquiry or reference to cars before they came to Lawrenceville. The point I desire to make is this: The Act under which they are suing says that both the plaintiff and defendant must, at the

time of the accident, have been engaged in interstate commerce. Now, I take it that as far as they can go back into the history of the movement of this train, to undertake to bring this particular action under the Act of Congress, is the making up of the train here in Lawrenceville. If there was any engaging in interstate commerce, it was at the time they began to make up the train here at
56 Lawrenceville, to take it somewhere else. If you are going to depart from that rule, how far back are you going in tracing the movement of these cars? Are you going into Danville? If you are going to Danville, why can't you go to Greensboro, or any other place from which they may have started, one or two weeks previous? In my judgment the inquiry should be confined not to when the cars arrived at Lawrenceville (that is immaterial), but what was done with them when they started away from Lawrenceville.

Mr. BUFORD: If your Honor please, I think my friend, Mr. Williams, takes rather too narrow a view.

Mr. WILLIAMS: Possibly so. We are working on new ground. This is the first case I have tried under this law, and I do not pretend to know all about it.

Mr. BUFORD: My friend is extremely frank, if your Honor please, he admits that this ground is too narrow.

The COURT: The objection is overruled.

Mr. WILLIAMS: I take an exception.

By Mr. BUFORD:

Q. Now, answer the question, please, how did these cars come to Lawrenceville—when were they brought there, and by what train?

A. I think all of them but one were brought in by train No. 64 the day before.

Q. Which was it that was not brought in by train 64?

By Mr. WILLIAMS (interposing): Do you know it of your own knowledge, or on any record made of your own?

A. I have no record of my own, but from the record of the office.

Mr. WILLIAMS: I am compelled to renew my objection. They are attempting to show where these cars came from on 64.
57 This witness has no independent recollection, and the only way you can do would be to have the witness who made the original record. That is my point. Here is a record which is proven to be a record of the company, relied on by the company, and used by the company. That is all true, but the rule of law is that you must call the man who made the original record. It is a good rule of law, and why? If there was any fraud about it, he is the only man you have the right to cross examine, and see if there was fraud.

Mr. BUFORD: What I would like to ask Mr. Ligon is this:

(Mr. BUFORD:)

Q. Is the man working at the office now who made that record?

A. No, sir.

Q. Where is he?

A. As I said a while ago, I don't know. I don't recognize his handwriting, and the only way I can tell is to examine further records at the office.

Q. Further records at the office?

A. Yes, sir.

Q. Well, I wish you would examine the further records during the recess. Without pressing that question right now, I am going to ask you did you mention train 64?

By the COURT: Yes.

By Mr. BUFORD:

Q. You mentioned that?

A. Yes, sir.

Q. Tell the jury what train 64 is?

A. Train 64 is what is known as a local from the west, running from Danville to Lawrenceville.

Q. A local freight train running from Danville to Lawrenceville?

A. Yes, sir.

Q. At what time, before the accident, did this local freight train, known as No. 64, come to Lawrenceville from Danville?

A. Sometimes in the afternoon of the 18th—the day before.

Q. Of August 18th?

A. Yes, sir.

58 Q. What is the practice of the company with reference to the freight cars that are brought to Lawrenceville by train No. 64

Mr. WILLIAMS: Now, may it please your Honor, I desire to renew the objection to that question. That is entering into an investigation not as to No. 62, on which this plaintiff got hurt, but on No. 64. I take it, your Honor will rule in the same way you have done, but I do not desire to appear to omit the objection.

The COURT: I understand you want to know what became of the cars on 64?

Mr. BUFORD: Yes, whether they were taken further.

NOTE.—The objection is overruled, and an exception is noted by counsel for the defendant.

By Mr. BUFORD:

Q. What is the practice of the company, Mr. Ligon—what was the practice, at the time of the accident, with reference to the freight cars that were brought from Danville to Lawrenceville, or from Danville and points between Danville and Lawrenceville to Lawrenceville, on the evening of August 18th? How were they carried east?

A. They were switch listed to the eastbound trains.

Q. Which train

A. Solids to the through trains and others to local trains.

Q. What is the number of the local train?

A. 62.

Q. So then a part of the cars that are brought into Lawrenceville from the Danville division, by means of train 64, are, according to

the practice of the company, put into train 62 which goes from Lawrenceville east to Pinners Point?

A. That is correct.

Q. And now you say the cars you have mentioned were put into train 62 under those circumstances?

A. Yes, sir.

By Mr. BUFORD: I believe that we have no other questions for Mr. Ligon, if you will look up the records that we were talking about.

(No Cross Examination.)

59 J. C. RICE, on behalf of the plaintiff, being duly sworn, testified as follows:

Examined by Mr. BUFORD:

Q. Mr. Rice, what position do you hold?

A. As agent for the Southern Railway Company, at Jeffress, Virginia.

Q. Have you records of your office at Jeffress, Virginia, with you?

A. Yes, sir. Do you want me to get them?

Q. Yes.

A. (Witness produces same.)

Q. Mr. Rice, by whom were those records kept?

A. A part kept by myself and a part kept by my wife, who was clerk at the time.

Q. Will you examine these records, please, sir, and tell us whether they show that any cars mentioned by Mr. E. W. Ligon, the agent at Lawrenceville, as composing train 62, were a part of train 64 when they passed Jeffress station on the 18th of August 1911?

Mr. WILLIAMS: May it please your Honor, I object. Jeffress is west of Lawrenceville. Here is an inqury as to what was done on the day previous to this accident at a point west of Lawrenceville. I submit that that is not material to this inquiry.

The COURT: It is a junction point, as I understand, where the road enters North Carolina.

Mr. PETERSON: The object of this testimony is simply this: Our object is, according to the bill of particulars that we have filed, to ascertain the character of the occupation of this railroad at the time of the accident to the plaintiff, and the fact that at the time *of* the accident was sustained he was employed by the railroad engaged in interstate commerce. To do that we want to show what the function of this train 62, when it arrived at Lawrenceville, was, and so far as shipments were concerned it is a continuation of that train 64. We want to show that the train was engaged in interstate
60 commerce not only by reason of the function of taking on any freight between here and Pinners Point, if offered, whether in or out of the State of Virginia, but also that it had in its possession merchandise in transit from North Carolina, from Drakes

Branch, Chase City en route to Philadelphia and New York; that it was in continuous transit from one train to another.

The COURT: Objection overruled.

Mr. WILLIAMS: I take an exception.

By Mr. BUFORD:

Q. Will you please answer the question.

NOTE.—The question is read as follows: "Will you examine those records please, sir, and tell us whether they show that any cars mentioned by Mr. E. W. Ligon, the agent at Lawrenceville, as composing train 62, were a part of train 64 when they passed Jeffress station on the 18th of August, 1911?"

A. You have the list Mr. Ligon mentioned?

Q. Yes. I will read the list. He said train 62 was composed of Southern car 10753.

A. I have no record of that.

Q. A. C. L. No. 29093.

A. No record.

Q. N. Y. P. & N. car 1352.

A. No record.

Q. Southern car 133479.

A. No record of that.

Q. Southern car No. 30790.

A. I have a record of that. Just a moment. (Witness refers to records): Yes, I have a record of that, August 18, 1911.

Q. 30790?

A. Yes, 30790.

Q. What shipments did that car contain, Mr. Rice?

A. That was a car in 64 when it reached my place, and we loaded into that car three shipments from Oxford, North Carolina,
61 one destined to Union Level, Virginia, two of which were destined to Emporia, Va.; one shipment from Drakes Branch to New York, and another shipment from Chase City to Philadelphia.

Q. What were those shipments?

A. My records do not show, but Mr. Campbell, another witness, handled the original waybill. We kept the number of the car and waybill, but not the original article.

Q. So your records show that Southern car No. 30790 contained a shipment from Oxford, N. C., to Union Level, Virginia?

A. Yes, sir.

Q. It also contained a shipment from Oxford, N. C., to Emporia, Virginia?

A. Two shipments.

Q. It also contained shipment from Drakes Branch to the City of New York?

A. Yes, sir.

Q. It also contained a shipment from Chase City, Virginia, to the City of Philadelphia, in the State of Pennsylvania?

A. Yes, sir.

Q. You have no record of 11956? My impression is that that was taken up after the train passed your place?

A. No record of it.

Q. And no record of 136532 Southern.

A. No.

Q. They were not composed in train 64 when they passed your place?

A. No record of it if it contained it.

Q. It contained no shipment?

A. I only loaded into one car on that train.

Q. Now, Mr. Rice, where is Jeffress Junction?

A. Jeffress Junction is 46 miles west of Lawrenceville.

Q. Is it on the line between Danville and Lawrenceville?

A. Yes, sir.

Q. What state?

A. In Virginia.

Q. In Virginia?

A. Yes, sir.

Q. What junction—what other road is there?

A. The Keysville and Durham branch of the Southern Railway.

62 Q. The Keysville and Durham plies between Richmond, Virginia, and Durham, North Carolina?

A. Yes, sir.

Q. Is the town or city of Oxford, North Carolina, on the Keysville & Durham division?

A. Yes, sir, 26 miles south of Jeffress.

Q. The state line passes a little south of Jeffress?

A. Yes, sir.

Q. Is it, or not, a fact that freight cars coming from that division of the Southern, coming from North Carolina and points south, are transferred to the Atlantic and Danville division, to the Norfolk and Danville division, we call it now, and hauled through Jeffress to Lawrenceville, and from there to Norfolk?

A. Yes, sir, we transfer both carload and less than carload shipments at that place.

Q. So it is engaged in that kind of commerce between the two states?

A. Yes, sir.

Q. I believe the court takes judicial notice of the geography of the state, but please state to the jury whether or not Lawrenceville is between Emporia and Jeffress Junction?

A. Yes, sir. Lawrenceville is 46 miles east of Jeffress, and Emporia is 67 miles east; it is east of Lawrenceville. It is 46 miles to Lawrenceville and 67 to Emporia, making Emporia east of Lawrenceville.

Q. Will you tell the court and jury whether the Atlantic and Danville division——

A. (Interposing.) The Norfolk division of the Southern Railway is the term.

Q. The term "Norfolk division" embraces the road between Danville and Norfolk?
A. Yes, sir.

By the COURT:

Q. Does it embrace anything else?
A. A branch line from Emporia to Claremont, and also, I think, a part of the division consists of business handled over the Selma division over the Coast Line.

63 By the COURT:

Q. The Norfolk division don't mean this line, then, exactly?
A. The Norfolk and Danville instead of the Atlantic and Danville.
By Mr. BUFORD: We call it now, for the purposes of this case, the Norfolk and Danville division. Does that division lie wholly in the State of Virginia?
A. No.
Q. What state does it traverse?
A. North Carolina and Virginia.
Q. So that between Norfolk and Danville this road runs partly in North Carolina and partly in Virginia?
A. Yes, sir.
Q. Well, now, would passengers and freight passing over this line from Danville to Norfolk necessarily pass through the states both of Virginia and North Carolina?
A. Yes, sir.

(No Cross Examination.)

C. L. CANDLER, on behalf of the plaintiff, being duly sworn, testified as follows:

Examined by Mr. BUFORD:

Q. Mr. Candler, what is your position—what position do you hold, if any, with the Southern Railway Company?
A. General Agent Norfolk and Pinners Point terminals.
Q. Have you any records, Mr. Candler, showing what cars composed train No. 62, which, I understand, is the freight train made up at Lawrenceville, and runs from Lawrenceville to Pinners Point, on the 19th day of August, 1911?
A. I have a record of what that train is said to have been composed of. I did not make the record myself.
Q. Who made the record?
A. One of the clerks connected with the Pinners Point office. I do not remember which one.
Q. Is that one of the records of the office?
A. Yes, sir.
Q. One of the official records of the Southern Railroad Company?
64 A. Yes, sir.
Q. What does that record show?

Mr. WILLIAMS: I object, may it please your Honor. He must have some independent recollection of it himself, or he must speak from a record made at the time. It is not claimed that he has any independent recollection, or any knowledge of it. He has testified that he did not make that record.

The COURT: Objection sustained.

By Mr. BUFORD:

Q. Where is that clerk, Mr. Candler?

A. I do not know the individual, or the name.

Upon request of counsel for the plaintiff, the court, at 12:50, adjourned until 2:15 for lunch.

Afternoon Session.

MARCH 4, 1912.

The court met at the expiration of the recess.

Present: Same parties as heretofore.

R. G. RENFROW, recalled for further examination on behalf of the plaintiff, testified as follows:

Examined by Mr. BUFORD:

Q. Mr. Renfrow, you stated awhile ago that Southern car No. 30790 was one of the cars in the train which you took from here to Norfolk?

A. Yes, sir.

Q. Mr. Rice has testified that that car contained some shipments that were destined for New York and Philadelphia. You did not unload those shipments at any intermediate stations between here and Norfolk, did you?

A. Not that I know of.

Q. In the natural course of transit, they would have been unloaded where?

65 A. At Pinners Point.

Q. And that is the Norfolk terminal?

A. Yes.

Q. Just on this side of the Elizabeth River?

A. Yes, sir.

A. B. GRIGGS, on behalf of the plaintiff, being duly sworn, testified as follows:

Examined by Mr. BUFORD:

Q. Mr. Griggs, what is your position?

A. Agent of the Southern Railway Company at Danville.

Q. Were you agent for the Southern on the 18th and 19th of August, 1911?

A. Yes, sir.

Q. At Danville, Virginia?

A. Yes, sir.

Q. Do your records show that N. Y. P. & N. car No. 1352 was a

part of freight train No. 64 that came from Danville to Lawrenceville on the evening of the 18th of August, 1911?

Mr. WILLIAMS: I make the same objection; unless the witness knows of his independent memory, or from a record made at the time, he is an incompetent witness.

The COURT: I think that position is correct.

Mr. BUFORD: We note an exception as to this witness, and as to the other two.

Mr. PETERSON: We want to except for this reason. We are putting the witness on, necessarily, as an employee of the defendant company. All this information is information which we elicit from the company's own records. It is a case entirely contradistinguished from a case where a person produces his own books, which are in the nature of self-serving declarations. They are the official records of the company, and whether true or false the company can only say. They are recognized among the company's official
66 archives, and the burden shifts to the company to show that they are incorrect.

Mr. BUFORD: We want to state what we expect to prove. What we expect to prove by this witness is that the train we have just mentioned——

Mr. WILLIAMS: To state what you expect to prove, if the objection is to the evidence, it is proper, but here the objection is to the competency of the witness.

Mr. BUFORD: As I understand the rule of the Court of Appeals, it is when we offer a witness, the bill of exceptions should state what we expect to prove by the witness. What we want to prove, I started to say, was that N. Y. P. & N. car 1352 was a part of train 64 that came from Danville to Lawrenceville on the evening of August 18, 1911, and that this same car was put in train 62, the one from which the plaintiff received his injury, and that it contained a shipment of merchandise from Spencer, North Carolina, for delivery to intermediate stations between Danville and Norfolk. That is the fact which we want to prove.

The COURT: What was his answer—that he did not keep the record?

Mr. WILLIAMS: He has never answered.

By Mr. BUFORD:

Q. Did you, in fact, keep the records yourself?

A. No, sir.

Q. Who kept them?

A. It was kept in the yardmaster's office, but I could not say by whom.

Mr. PETERSON: You see we could never in the world find out.

By Mr. BUFORD:

Q. That is one of the official records kept for the Southern Railroad Company, is it not?

A. Yes, sir.

Q. It is regarded by the Railroad Company and its officers as being an official and authentic record, is it?

67 A. Yes, sir.

Q. In all the business dealings of the company, where it has any occasion to refer to this particular record, this would be treated by it as importing the truth, wouldn't it?

A. Yes, sir.

Q. When you take it from this court room, you will take it and restore it to its place as a part of the files of the company?

A. Yes, sir.

The COURT: I sustain the objection for the present. I reserve the right to consider the matter further before the trial closes.

Mr. BUFORD: We reserve the exception. The same explanation we make as to the other witness, except we wanted to show by Mr. Candler that Southern car 133479 had two bags of peanuts shipped from Franklin, Virginia, to Hillsboro, N. C.; two buggies shipped from Franklin, Virginia, to Kershaw, N. C.; one crate of wheels from Franklin, Virginia, to Johnson, North Carolina; that Southern car 30790 contained a box of clothing shipped from Drakes Branch to New York City and contained four tier-s of tobacco shipped from Chase City, Virginia, to Philadelphia, Pennsylvania. I will state to the court that those are the two shipments Mr. Rice testified to. I think Mr. Rice's testimony covers the point, but we wanted to supplement his testimony by Mr. Candler.

By the COURT:

Q. What is that paper you have in your hand?

A. A record of the cars composing train 64 out of Danville on August 18, 1911, which was made by the yardmaster's office.

(No Cross Examination.)

J. S. BERGMAN, on behalf of the plaintiff, being duly sworn, testified as follows:

68 Examined by Mr. BUFORD:

Q. Mr. Bergman, what is your position, or what was your position on the 19th day of August, 1911?

A. Superintendent of the Norfolk division Southern Railway.

Q. Does that embrace the division between Danville and Norfolk?

A. Yes, sir.

Q. Tell the jury what were the functions and duties of train 62 which left Lawrenceville on the morning of August 19, 1911, for Pinners Point?

A. Train 62 is a local freight train made up at Lawrenceville, running between Lawrenceville and Pinners Point, to do the local work, load or unload freight, do the necessary switching at all stations, picking up and setting off cars.

Q. Does train No. 62 start at Lawrenceville?

A. Yes, sir.

Q. Train No. 64 comes in from the Danville end?
A. Yes, sir.
Q. Train No. 64 does not go further than Lawrenceville?
A. No, sir.
Q. Then, as I understand you, 62 is made up of trains that come from the Danville end?
A. 62 is made up partly of trains coming from the Danville end, or it might be cars originating at Lawrenceville.
Q. In other words, train 62 is made up of cars originating at Lawrenceville, or cars brought to Lawrenceville from the western end?
A. Yes, sir.

By the COURT:

Q. Is, or not, train 62 a continuation of train 64, so far as any cars are concerned which come from the west?
A. Not necessarily, Judge.
Q. I mean cars carrying local freight—not full cars?
A. In some instances, yes; in some instances cars coming in on 64 go through on 62.

By Mr. BUFORD:

Q. When does train 64 leave Danville?
69 A. It leaves Danville at 6:15 in the morning.
Q. When does it arrive at Lawrenceville?
A. I think 3:45 or four o'clock, or something about that time; I don't know exactly.
Q. In the afternoon?
A. Yes, sir.
Q. Then, when does 62 leave Lawrenceville for Norfolk?
A. It ought to leave at six A. M.
Q. When does it arrive at Norfolk or Pinners Point?
A. 3:30.
Q. P. M.?
A. Yes, sir.
Q Any shipments destined from any stations along the line between Danville and Norfolk, for points outside of the State of Virginia, would, according to the functions of train 64 and train 62, be put on those trains, wouldn't they?
A. Local shipments?
Q. Local shipments or interstate commerce?
A. Yes, sir.
Q. Why are they called local trains, as distinguished from through trains?
A. Because they principally do local work.
Q. They stop at all the stations, I understand?
A. If there is any work.
Q. To be done at the stations?
A. Yes, sir.
Q. The through trains do not stop at all the stations, do they?
A. Not unless they have something to set off or to pick up.

Q. And that would be a solid car?
A. Generally, yes, sir.
Q. The Norfolk and Danville division connect at Danville with the main line of the Southern which runs from Washington all the way down through the southern states?
A. Yes, they connect there.
Q. And what connection has it at Norfolk with points outside of the state?
A. Well, they connect with the various boat lines there, or other railroads.
70 Q. Connect with the boats plying between New York, Baltimore, Philadelphia and Washington?
A. Yes, sir.
Q. And other railroads engaged in interstate commerce?
A. Yes.

Cross-examination.

By Mr. WILLIAMS:

Q. Mr. Bergman, are there any other freight trains out of Lawrenceville going east except 62?
A. Yes, sir.
Q. What are they?
A. We have a through train out of here known as 88.
Q. 88?
A. Yes, sir.
Q. Any other?
A. That is all.

By the COURT:

Q. That is a through freight, you say, is it?
A. Yes, sir, considered through freight.

By Mr. WILLIAMS:

Q. What time is that due to leave Lawrenceville?
A. Eight P. M.
Q. If there are cars in the yard at Lawrenceville ready to go east, to Pinners Point, does 88 carry them?
A. Yes, sir, most always.

F. J. OLIVER, on behalf of the plaintiff, being duly sworn, testified as follows:

Examined by Mr. BUFORD:

Q. Mr. Oliver, what position did you hold on the 18th and 19th of August, 1911?
A. Agent for the Southern, at Suffolk.
Q. At Suffolk, Virginia?
A. Yes, sir.
Q. Can you tell the court and jury, of your own personal
71 knowledge, whether any interstate shipments were made on train No. 62 on the 19th day of August, 1911?

A. I cannot.

Mr. WILLIAMS: May it please your Honor, I object to this line of examination. This was long after the accident. That was way down yonder in Suffolk, and it must have been hours after the accident. The question is whether the plaintiff and defendant were engaged in interstate commerce at Lawrenceville at the time of the accident, and how can they do that by inquiring whether they had it in Suffolk long afterwards?

The COURT: I think that is permissible. I think it tends to show whether they were engaged in interstate commerce.

Mr. WILLIAMS: I except.

J. H. EGGLESTON, on behalf of the plaintiff, being duly sworn, testified as follows:

Examined by Mr. BUFORD:

Q. Mr. Eggleston, were you a member of the train crew of train 62 on the morning of the 19th of August, 1911?

A. Yes, sir.

Q. That is to say train 62 of the Southern Railroad Company, which started from Lawrenceville to Pinners Point on that day?

A. Yes, sir.

Q. What position did you hold, Mr. Eggleston?

A. Brakeman.

Q. You were brakeman on that train?

A. Yes, sir.

Q. Who composed the train crew?

A. Captain Renfrow, Clift Williams and E. H. Pulliam and myself were the train crew.

Q. Who was the fireman?

A. Mr. Jacobs.

Q. Mr. Ralph B. Jacobs, the plaintiff?

A. Yes, sir.

72 Q. Is not it the phraseology of the railroad people that a fireman is a member of the train crew?

A. Yes, sir.

Q. He was also a member of the train crew?

A. Yes, sir.

Q. He was an employee of the Southern Railroad Company, as fireman on this train?

A. Yes, sir.

Q. Did you see the accident which resulted in the loss of his leg?

A. Yes, sir.

Q. Please tell the jury how it occurred?

A. As near as I can. I was on top of the cars as they were being pulled out of the siding, and I saw Mr. Jacobs as he came out to get on the engine. It seemed, the best I could see, from the distance I was, that he aimed to set his cooler of water on the deck of the engine. As to whether he ever set it up there, I am not able to say positively. I saw him, and he seemed to have fallen, or missed

his hold, or something, and fell, and the journal box on the tank struck him, and rolled him over, and I do not think he got under the train entirely until after the tank of the engine had passed him. Then he rolled down underneath the front car, and the best I could see of him the box knocked him, and rolled him until I think possibly one or two of the cars had passed him before his leg was cut off.

Q. His leg was cut off, was it?

A. Yes, sir.

Q. Where did that accident occur, Mr. Eggleston?

A. Right above the passenger station.

Q. In the yard here at Lawrenceville?

Yes, sir.

Q. When you say above, you mean east of the passenger station?

A. Yes, sir.

By the COURT: Do you mean east or west?

By Mr. BUFORD: East.

By the COURT: He said "down."

73 By Mr. BUFORD: It is either up or down. The general tendency is down.

A. I could not say how far it was from the station. It was not very far.

(Mr. BUFORD:)

Q. Comparatively a few yards?

A. Yes, sir.

Q. Mr. Eggleston, that was on the 19th of August, 1911?

A. Yes, sir.

Q. I asked, I believe, if that was not train 62?

A. Yes, sir.

Q. Now, what caused Mr. Jacobs to fall, so far as you can tell the jury?

A. Well, I really could not say exactly what caused him to fall. He must have lost control of his feet, by aiming to set his cooler up on the deck of the engine, and those cinders under him there probably——

Q. Coming in contact with the cinders?

A. Coming in contact with them might have had something to do with it.

Q. What kind of cinders were they—what were the cinders?

A. Cinders where the passenger trains cleaned their fires there—No. 2 and *and* No. 4; I think that is all that cleaned their fires there.

Q. Where do the other engines clean their cinders?

A. No. 1 and No. 3 I think clean theirs on the west side of the depot.

Q. What sort of pile of cinders was it?

A. Cinders that came out of the fire box.

Q. How high were they?

A. I reckon probably 18 or 20 inches high.

Q. All loose cinders?

A. Well, yes, they were practically loose. They had been packed down some by walking over them.

Q. For what length of distance did they extend up and down the railroad track?

A. I really could not say the exact distance. I never took any measurement of it, but I suppose something like 30 feet.

Q. How wide were they from the rail up—as I understand it, it was on the north side of the track?

74 A. Yes, sir.

Q. How wide were they from the northern rail up this way?

A. I reckon, to the best of my judgment, probably five or six feet; may be seven feet.

Q. So, then, here was a pile of cinders five or six or seven feet wide, about 30 feet long, lying alongside of the rail, and about 18 or 20 inches deep?

A. Yes, to the best of my judgment.

Q. That he came in contact with?

A. Yes, sir.

Q. He stumbled there and fell under the train?

Mr. WILLIAMS: I don't know that he said that.

By Mr. BUFORD:

Q. What did you say?

A. I say when he set his cooler of water—or, his intentions were, the best I could see, to set his cooler of water on the deck of the engine, he came in contact with something that caused him to fall. I could not say definitely that the cinders threw him, or how it occurred.

Q. Do you know whether he set the cooler down on the deck of the engine, or not?

A. I thought that he did, but I was some little distance from him. I could not say positively that I know that he did set it down.

Q. What was your position?

A. I was on top of the train getting the brakes off the cars as they were being pulled out of the yard.

Q. How long had the cinders been there, do you know?

A. Well, I could not say positively, Mr. Buford. They accumulate there from time to time. Sometimes they stay there longer than others. It just depends on the amount of them that has got out there.

Q. Had the train been completely made up at the time of the accident?

A. I don't think it had. I do not think we had quite finished making the train up. In fact, I am positive that we had not. I think we made a switch or two may be after the accident.

75 Q. What time of day was the accident?

A. It was something between six and seven o'clock, I think, or between five and six. Captain Renfrow can tell you better than I can about that. I don't remember exactly what time the accident occurred.

Cross-examination.

By Mr. WILLIAMS:

Q. Mr. Eggleston, you were asked just now about what time, and you said you could not remember the exact time; was it sunset?

A. It was getting light; I think the sun was up.

Q. Now, Mr. Eggleston, how long had you been working here as brakeman on the Southern Railway?

A. Well, off and on since 1903, I believe.

Q. Now, tell the jury during all that period if these cinders had been piled up there off and on as they were when the accident occurred?

A. Yes, sir, off and on ever since I have been there those cinders have been accumulating there.

Q. You say that is ever since 1903?

A. I think so.

Q. Do you know how long Mr. Jacobs has been working here on this yard as fireman?

A. I could not say I know exactly how long he has been here.

Q. You can't tell exactly, but give an impression?

A. Somewhere near two years, I reckon.

Q. Now, Mr. Eggleston, how close to the middle of that cinder pile was Mr. Jacobs when he fell?

A. Well, I could not say the exact spot. It appeared to me to be somewhere near the middle of it, somewhere near the middle of the cinder pile.

Q. You have known Mr. Jacobs a good long time, haven't you?

A. I have only known him since he came to Lawrenceville.

Q. You think it has been about two years?

A. It has been over two years now. I do not know how long he had been here when the accident occurred.

76 Q. Do you know about how long he had been working here before this accident occurred?

A. No, sir. That is what I told you a minute ago, I don't know exactly how long he had been here when the accident occurred. I have known him over two years. I knew him when he came here and up until now.

Q. Now, Mr. Eggleston, with reference to the well—there is a well up to the northward?

A. Yes, sir.

Q. With reference to that well and the track, was Mr. Jacobs in line with the well as you go straight from the well to the track?

A. I thought he was when I saw him, but I have learned since that I was mistaken in the place that he got his water.

Q. When you first saw him, what was he doing?

A. Going to the engine, and I was confident that he got his water from Mr. ——.

Q. In going to the engine, when you first saw him, did he have to cross the cinder pile to get to the engine?

A. Yes, sir.

By the COURT:

Q. Where did he get the water from?
A. Well, he told me, I think——

Mr. WILLIAMS: It is contrary to the law to tell what he said. He is going on the stand, and can testify to that.

WITNESS: I can't say I know where he got the water.

R. B. JACOBS, the plaintiff, being duly sworn, testified as follows:

Examined by Mr. BUFORD:

Q. Mr. Jacobs, are you the plaintiff in this case?
A. Yes, sir.
Q. What position did you hold, Mr. Jacobs, on the 19th day of August, 1911?
A. Fireman.
77 Q. Did you receive the injuries that are described in the declaration in this case?
A. Yes, sir.
Q. Tell the jury all the facts and circumstances under which you received that injury?
A. Well, to begin with I was called at five o'clock. I got down to the roundhouse, and changed clothes, and got my overalls on, and went on and got on the engine, and got the engine ready to leave the yard. We left the shop yard at six o'clock, and pulled up on the main line, and pulled up to the tank and got water. Then we pulled up above the depot, and I got my fire ready.
Q. You got water for the engine?
A. Yes, sir, to use in the boiler.
Q. That was to use in the engine?
A. Yes, sir.
Q. Not the water you got afterwards before the injury?
A. No, sir. We commenced switching, and I took the water cooler and got off the engine up at the depot, and started to the house to get water. I went up the hill to Mrs. Moody's, the place I boarded, and intended to get my breakfast and dinner at the same time. Then I come on back across the bridge, and come down by Captain Moody's—in front of Captain Moody's—not Moody's, but Harrison's,—and came down the railroad road—I don't know what street it is, and come across the track on the crossing. At the time the train was pulling out of the last track. So I waited until the train was pulling up there, and aimed to catch it, and when I aimed to catch it I made three or four steps to get on it, you know, and I got to the cinder pile before I knew it, and I tripped, and went under the engine.
Q. What tripped you?
A. The cinder pile.
Q. Did you eat breakfast at your boarding house that morning?
A. No, sir.
Q. You said you went there to get your breakfast and dinner both?

A. Yes, sir, in a bucket.
Q. Did you get it?
A. No, sir.
78 Q. You did not get your food?
A. No, sir, I didn't get anything but water.
Q. You got a cooler of water?
A. Yes, sir.
Q. What sort of cooler was it?
A. I suppose the cooler was about that long (indicating), and about that large around (indicating), with a handle to it, made like a bucket.
Q. A tin cooler?
A. Yes, sir.
Q. It would hold about how much water?
A. Not over a gallon.
Q. Where were you getting that cooler of water from?
A. At Mrs. Moody's.
Q. Why?
A. For drinking purposes.
Q. For who?
A. Myself and the engineer.
Q. In the cab?
A. Yes, sir.
Q. Did the Railroad Company supply you with drinking water on the run?
A. No, sir, we had to get it ourselves.
Q. How long had that been the practice of the company to supply yourself with water that way?
A. Ever since I have been on the road.
Q. So it was a part of the practice of the road for you and the engineer to supply yourselves with a can of water to drink on the trip from here to Norfolk?
A. Yes, sir.
Q. Where was your boarding house?
A. Mrs. Moody's.
Q. That is just this side of the overhead bridge?
A. Yes, sir, right at the corner of Captain Moody's store.
Q. Then, as I understand you to say, you went over the overhead bridge?
A. Yes, sir, back the back gate, and over the overhead bridge, and to the station.
Q. And crossed there?
A. Yes, sir.
Q. And saw the train coming along?
79 A. Pulling out of the sidetrack by the depot—not by the side of the depot, but at the west end.
Q. Coming along the track to the east end of the depot?
A. Yes, sir.
Q. And you stood there, and I understood you to say undertook to get on the engine as it came along?

Mr. WILLIAMS: I have not objected, but I must object to that line of examination as distinctly leading.

The COURT: I think it was leading. The objection is sustained.

By Mr. BUFORD:

Q. Then you got across the railroad?

A. Yes, sir, and I got across the railroad track before the train got to the depot. It was about the west end of the depot.

Q. Then, on which side of the track were you on—the north or south side?

A. The north side. I come down on the south side and crossed over.

By the COURT:

Q. I thought when he got back there that he was on that side?

A. No, sir. I can catch a train better on the left side.

By Mr. BUFORD:

Q. Had the train started out?

A. No, sir.

By the COURT:

Q. Was it on the side track or main line?

A. It was pulling on the main line. It was just about on the main line at the time I was hurt.

By Mr. BUFORD:

Q. How fast was the train moving, do you know?

A. Just about as fast as anybody could walk, that is pretty peart walking; not over three or four miles and hour at the most.

80 Q. State whether or not it was customary for the trainmen to get on and off the engine when it was going that way?

Mr. WILLIAMS: I object to that, may it please your Honor; unless it is shown that the officers of the company knew and acquiesced in it, it would not be competent.

By Mr. BUFORD: I was going to follow it up.

Q. State whether or not that was done with the knowledge of the officers?

A. It has been customary ever since I have been on the road, and they all know it, and I have seen it done hundreds of times a day, I reckon.

Q. Was there any rule of the company forbidding your getting on a train moving that way?

A. I never saw any.

Q. Did they ever furnish you a rule book?

A. No, sir.

Q. All during your service you were never furnished with a rule book?

A. No, sir.

Q. Were you ever instructed not to?

A. No, sir.

Q. When you started to get on the engine, how far were you from the edge of this pile of cinders?

A. I was about the further side of the crossing, and the cinder pile commencing on the east end of the crossing. I was about the distance from here to you from the cinder pile when I aimed to catch it.

Q. That would be somewhere about——

A. About seven feet.

Q. From the edge of it?

A. Yes, sir.

Q. The crossing, that is the crossing that goes from Front Street, the street that the Clairborne Hotel is on, down?

A. Yes, sir, down at the deport.

Q. Now, what kind of cinder pile was it, Mr. Jacobs? Describe the cinder pile to the jury.

81 A. To the best of my knowledge is was about eighteen or twenty inches, or may be twenty-four inches deep, and as long as across this room, and about the distance from here to Mr. Peterson, the width of it.

Q. Now, how did those cinders give way under your feet? Were they piled up close to the rail?

A. Yes, sir, right up against the rail. They sloped from the rail, and come up this way (indicating).

Q. Was it a steep slope, or slanting?

A. Steep.

Q. Describe to the jury exactly how those cinders caused you to fall?

A. As I caught the engine, I made several steps, and as I hit the cinder pile they commenced miring just like mud, and it caused me to fall, and when I fell in the cinder pile the journal box kept hitting, and I couldn't get up. I tried, but couldn't.

Q. Why couldn't you?

A. Every time I made an effort the cinder pile gave way with me.

Q. Do you know which car ran over your leg?

A. I could not say for certain, but I think it was the first car. I didn't go clear under the engine, but went down by the journal box, and after the engine passed I rolled between the engine and the car down by the rail, and I could not tell which car caught me, because everything hit me under there.

Q. Which leg was it that was cut off?

A. The right.

Q. It has to go in the record; of course the court and jury can all see it, but how high above the knee?

A. About two inches I guess, or three inches.

Q. Three inches above the knee?

A. Yes, sir.

Q. How old were you, Mr. Jacobs, when this injury occurred?

A. Twenty-three.

Q. You were twenty-three when you were hurt?

A. Yes, sir.

Q. Did you suffer much mental and physical pain?

A. I suffered very much physical pain, and mental, too?
Q. Have you any profession or professional business?
A. No, sir.
82 Q. How long were you laid up, Mr. Jacobs, from this injury?
A. Let me see. I was hurt the 19th, and I got out about the 17th of April, I think, on crutches.
Q. Something like four weeks?
A. Yes, sir. The leg never healed until April, 1912.
Q. Mr. Jacobs, was there anything to have prevented you from getting out of the way of the train but the cinder pile?
A. No, sir.
Q. If you had fallen without stumbling on the cinders?
A. I would have fallen clear of the track.
Q. Did you commence to stumble at all until you came in contact with the cinders?
A. No, sir.
Q. You did not?
A. No, sir.

By the COURT:

Q. As I understand you, you claim the cinder pile made you stumble and fall, and when you went to get up you were struck by the piece on the tender?
A. No, sir, I fell down behind the cinder pile. The cinder pile was sloping, and I fell down by the journal box, and the train was passing, and I rolled down next to the rail.

By Mr. BUFORD:

Q. When you say you fell behind, do you mean you fell between the cinders and the wheel?
A. Yes, sir.
Q. The slope of the cinders caused you to roll down next to the wheel?
A. Yes, sir.
Q. If there had been no cinders there, but you had fallen from some other cause, could you have gotten out of the way, out of danger?
A. Yes, sir.

By the COURT:

Q. Were the cinders which you stumbled over somewhat loose, or packed?
A. Yes, sir, somewhat miry like. They were mixed with the sparks—sparks out of the front of the engine.

83 By Mr. BUFORD:

Q. Were you conscious, when you started to get on that engine, of any danger to you from coming in contact with this pile of cinders?
A. No, sir.

Q. Was it in your mind at all?
A. No, sir.
Q. Did you know that there was a pile of cinders there?
A. I had a knowledge of it, of the cinders being there, but I did not know that it was dangerous. I had forgotten them being there at the time. I was watching when I was going to get on the engine—watching my feet, where I was going to step, and was not noticing the cinder pile.
Q. That was not in your mind, as I understand it?
A. No, sir, it was not in my mind.

By the COURT:

Q. Did you say the train was then fully made up and ready to leave?
A. No, sir; I guess it had about five or six cars at the time I was hurt.

By Mr. BUFORD:

Q. Five or six cars attached to it?
A. Yes, sir.
Q. What were you getting on the engine for?
A. To attend to my duties.
Q. To attend to your duties as fireman?
A. Yes, sir.
Q. Who was the engineer?
A. Mr. L. N. Stephenson.
Q. Was it customary for the engine, when it was shifting and making up trains like that, to stop for the men to get off and on?
A. No, sir, I have never seen it done in my life.
Q. What are your present means of making a living?
A. I haven't got any.
Q. You haven't got any?
A. No, sir.

By the COURT:

Q. What salary did you receive as fireman?
84 A. They are paid according to the trip. I made anywhere from $60.00 to $100.00. Sometimes I would not work all the time. It was according to the trips I made during the month.

Cross-examination.

By Mr. WILLIAMS:

Q. Mr. Jacobs, when did you go to work with the Southern?
A. February 17th, I believe, 1910. To the best of my knowledge and belief it was the 17th of February.
Q. Had you ever seen that cinder pile, Mr. Jacobs, accumulated there before the accident like it was at the time of the accident?
A. No, sir.
Q. What was the difference?
A. It was larger.

Q. How much larger?
A. A good deal larger. I could not exactly tell how much larger, but it was a good deal larger than I ever saw it before.
Q. When did you notice that it was so much larger?
A. I noticed it a day or two before.
Q. Before the accident?
A. Yes, sir.
Q. Why did you, after you had gone to Mr. Moody's—you say you went up there to get your breakfast?
A. To get my breakfast and dinner and a cooler of water.
Q. Did you get your breakfast?
A. No, sir.
Q. Why not?
A. Because they didn't have it. They had not finished it.
Q. Did I understand you did not expect to eat your breakfast, but expected to get it in a bucket?
A. Yes, sir.
Q. Why did you go on the south side?
A. On the north side.
Q. Moody's is on the north side?
A. Yes, sir.
Q. Why did you go across on the south side?
85 A. I had to climb a fence and come across a big steep bank, so I come across and went right down the road.
Q. When you saw the engine pulling up on the main track, going eastwardly, what did you understand the engine was going to do? How far did you expect it to go before it stopped?
A. There is no telling.
Q. How many cars, Mr. Jacobs, if you remember, were, at that time, attached to the engine?
A. About five or six.
Q. They were pulling out of one of the side tracks on to the main line?
A. Yes, sir.
Q. What was the object of doing that?
A. Switching cars to get them in place.
Q. In order to do that, how far would that engine move up the main line?
A. If it stopped exactly the length of the cars, I could not tell you exactly.
Q. If the object was to get the cars out of the side track, would not it move up the main line far enough to come back to get the cars on some other track?
A. To clear the switches it was coming out of, but they didn't always do that.
Q. What would be the object of going further east after the hindmost car had gotten fully on the main line?
A. Sometimes you can't see the brakeman in giving signals, and you want to see.
Q. The engineer would not go purposely any further than that, would he?

A. No.

Q. So when you saw the engine coming, you knew it was going to stop as soon as the rearmost car cleared the switch, didn't you?

A. Yes, sir.

Q. You knew that. After it cleared the switch, what would have been the next movement of that engineer, in the ordinary way of making up trains?

A. He would have backed out.

Q. He would have backed right down where you were?

86 A. He would have been running the same. He would have been running when he passed me again.

Q. While they are making up the trains on the yard, whose duty is it to take the signals from the brakeman?

A. The engineer and fireman both, if they are switching, from their sides. If from the fireman's side, it is the fireman's duty.

Q. If they were doing that switching while you were off getting your breakfast, you could not take those signals, could you?

A. No, sir. The signals, in switching from this end, are always given from the engineer's side.

Redirect examination.

By Mr. PETERSON:

Q. What do you mean—I didn't catch it exactly—what did you mean by saying the signals were given from the engineer's side?

A. In the east end here the signals are given from that side.

Q. Why are the signals from that side?

A. You can see better from that side, and most of the targets are on that side that you turn the switches from. There are one or two on this side, but they always run across, and turn the target, and then run across and give the signal.

Q. This train had five cars attached to the engine at the time?

A. Five or six.

Q. Now, where is the target or switch—I mean the target which operates the switch, on which the engine and five cars were moving?

A. Near the west end of the depot.

Q. Just about the depot?

A. Somewhere near the west end of the depot.

Q. If you had not boarded the engine there, you would have had to go five car lengths and the length of the engine down?

A. Yes, down towards the overhead bridge. If I had walked there, by the time I got there it would have been moving back this way.

87 Q. It is not customary for the engineer to wait for you at any particular place?

A. No.

Recross-examination.

By Mr. WILLIAMS:

Q. You said you started working there in 1910, in February. You had been working there about eighteen months then?

A. Yes, sir.

Q. During that period had they been cleaning out ashpans and piling these cinders up during all that period of time?
A. Yes, sir.
Q. That was the way section people did it, wasn't it?
A. Yes, sir.

By Mr. PETERSON:

Q. It is the custom of the railroad to discharge the cinders from trains two and four at this point?
A. Yes, sir.

By Mr. WILLIAMS:

Q. Do you remember what time it was just before you were hurt?
A. I can come pretty near telling you. It was 6:20 or 6:25.
Q. Was the sun up?
A. Yes, sir.

JOHN A. MALLORY, on behalf of the plaintiff, being duly sworn, testified as follows:

Examined by Mr. BUFORD:

Q. Mr. Mallory did you see the accident to Mr. Ralph B. Jacobs, which occurred on the morning of the 19th of August, 1911?
A. Yes, sir. It happened in two minutes after I arrived at the station.
88 Q. Tell the jury, as nearly as you can, what caused the accident?
A. I came in from towards the Southern Hotel, and right in front of the station I stepped up on one of the steps, and had my hand on the railing like that (indicating), fixing to go up on the porch, and I saw Mr. Jacobs coming across. The train was making up east, and he came and took a stand, and I didn't know what he was waiting for, and he made an attempt to get on; it was not going fast, and he held his hold until he got to the pile of cinders thirty yards from the station, and when he struck it he seemed to tangle, and every time he would attempt to get on he would make a stumble, and rolled down.
Q. How high were they?
A. I reckon fully eighteen inches, but much higher further.
Q. The further they went down the track, the higher they got?
A. Yes. Where he struck them, I reckon they were about that high, (indicating).
Q. You mean the cinder pile was about thirty yards from the station?
A. Yes, about thirty yards from the station, but he was not quite that far. He crossed the crossing. I reckon probably he was fifteen or eighteen—he lacked a few steps before he got to it. He was putting something on, and I think he put that on, but when he struck the cinders he went down, and he disappeared for a while, and then you could see him rolling, and the engine stopped. I ran and phoned for Dr. Lewis.

Cross-examination.

By Mr. WILLIAMS:

Q. How far do you say the cinder pile was west of the road there that crosses the track?
A. Thirty yards at the time the accident occurred.

By Mr. BUFORD:

Q. Not from the road?
A. From the station. Thirty yards exactly. I can tell now because the cinders are gone.

89 By Mr. WILLIAMS:

Q. I asked how far the cinder pile was from the crossing?
A. The cinder pile from the crossing was probably eighteen or twenty yards.
Q. How long is the cinder pile?
A. Somebody here said thirty yards.
Q. Didn't you see it?
A. Yes, sir. I reckon it was fully that.
Q. Fully what?
A. Twenty-five or thirty yards.

By the COURT:

Q. Yards or feet?
A. Feet.

By Mr. WILLIAMS:

Q. How wide was it?
A. Seven or eight feet. It was wider at the lower end than at this.
Q. Did you ever see that pile there before?
A. I don't remember. I have seen them accumulate there, and have seen them taking them away.
Q. How long have you seen that process going on?
A. I don't know.
Q. How long have you lived in Lawrenceville?
A. Thirteen or fourteen years.
Q. Have you seen it ever since you have lived in Lawrenceville?
A. I have seen them clean up the yard, and I have seen them accumulate.

The plaintiff rests.

R. G. RENFROW, on behalf of the defendant, being duly sworn, testified as follows:

Examined by Mr. WILLIAMS:

Q. Mr. Renfrow, have you got your train book with you?
A. No, sir.

Q. (The book is handed to the witness.) You were conductor in charge of this train at the time of the accident?

90 A. Yes, sir.

Q. How long have you been working with the Southern Railway?

A. Thirteen years the 6th of last August.

Q. Now, does your duty require you to keep an accurate account of the movement of the cars in the various trains you handle?

A. I have to put them on a book, and give the destination of them.

Q. Have you got that book with you?

A. Yes, sir, here it is.

Q. Refreshing your memory with that book, tell the jury what number of cars you were switching out of the side track on to the main line at the time of the accident?

A. Of the two cars?

Q. What number of cars you had hooked to the engine on that move?

A. I held four cars to come back into the yard to pick up two other cars I was carrying away in the train.

Q. How many cars were attached to the engine?

A. Six.

Q. Before you got the two last, you had four?

A. Yes, sir.

Q. What was your object in going back after those two cars on the side track?

A. So as to get them on the head of the train. They were to be set off at Emporia.

Q. You took up two cars off the side track, and pulled out on the main line, with the intention of backing them back to your train?

A. Yes, on the main line.

Q. Did you do that?

A. Yes, sir.

Q. Tell the jury what you did with the other four cars that were attached to the engine at the time of the accident?

A. I set them back in the yard, No. 1 track.

Q. Then that movement was for the purpose of getting out two cars?

NOTE.—Objected to as leading.

Q. What was the object of that movement?

91 A. To get the short hauls on the head of the train.

Q. Tell the jury, if you can, what two cars they were?

A. N. Y. P. & N. 1352 with a check local from here to Emporia, and set them out at Emporia; 136532 was a car of lumber destined to Franklin, but I set it off at Emporia to be scaled. Those were the two cars I was switching at the time of the accident.

Q. You said N. Y. P. & N. 1352?

A. Yes, sir.

Q. And Southern 136532?

A. Yes, sir.

Q. Where did you deliver those two cars?
A. Emporia.

Cross-examination.

By Mr. BUFORD:

Q. The other four cars composing your train had already been shifted out, and gotten on the main line?
A. I had five cars to my caboose car on the main line I had already switched out.
Q. And that included Southern car No. 30790?
A. Yes, sir. I had already had that switched on the main line.
Q. You had been previously switching that with the others, and gotten it on the main line?
A. Yes, sir.
Q. And the next movement you were to make was to couple to those cars, including Southern 30790, and proceed on your journey to Pinners Point?
A. Yes, sir.
Q. You got that car 30790 to Pinners Point, didn't you, on that trip?
A. Yes, sir.
Q. Carried it through?
A. Yes, sir.

T. B. GODFREY, on behalf of the defendant, being duly sworn, testified as follows:

Examined by Mr. WILLIAMS:

Q. What is your name?
92 A. Thomas B. Godfrey.
Q. Where do you live?
A. Suffolk.
Q. How were you employed the 19th of August, 1911?
A. By H. M. McClearry.
Q. Did you see this accident to Mr. Jacobs?
A. Yes, sir.
Q. Where were you sitting?
A. On the Midway Hotel porch.

NOTE.—A map is produced, and the witness was told to stand aside until the map could be proved by the engineer making it.

P. NELSON, being duly sworn, on behalf of the defendant, testified as follows:

Examined by Mr. WILLIAMS:

Q. You are one of the engineers of the Southern Railway?
A. Yes, sir.
Q. At my request, you came down here and made this map, did you?
A. Yes, sir.

Q. Is this map a fairly accurate portrayal of the situation which it purports to represent?
A. Yes, sir.
Q. I see you have marked here a point where Jacobs fell?
A. Yes, sir.
Q. Why did you put that mark at that point?
A. Mr. Godfrey showed me the location.
Q. You do not know where he fell, but you put it there because Mr. Godfrey told you?
A. Yes.

Mr. WILLIAMS: I now offer this map in evidence, marked Ex. A.

T. B. GODFREY resumes the stand for further examination:

By Mr. WILLIAMS:

Q. Now, Mr. Godfrey, please look at this map, and tell
93 the jury where you were sitting at the time you saw Mr. Jacobs get hurt?
A. Sitting right on the back porch.
Q. Of what house—marked on the map what?
A. Midway Hotel.
Q. What did you first notice about him, Mr. Godfrey?
A. He was coming over the railroad track.
Q. Go on and tell the jury what he did, and how he got hurt, and where he got hurt?
A. I first noticed him starting over the railroad track with a cooler in his hand. I noticed him coming over, and took my eyes off of him, and didn't notice him any more until he was on the cinders, and I noticed he fell, and the cars knocked him down, and he tried to get up, and it looked that it knocked him down three or four times.
Q. How far from the crossing did you estimate him to be when he fell?
A. I estimated about fifty feet, and when I seen it measured it was forty-nine feet.
Q. Did you tell Mr. Nelson in order that he might put it on the map where he fell?
A. Just about it.
Q. How do you fix where he fell?
A. I put a little piece of cinder on the track.
Q. When did you do that?
A. This morning.
Q. For what purpose?
A. To show Mr. Nelson where he fell.
Q. How many feet was he to the eastward of the western end of the cinder pile when he fell, according to your best estimate?
A. I don't know, sir, exactly. I judge that he was about half way of it.

By the COURT:

Q. Halfway what?
A. Half way of the cinder pile.

By Mr. WILLIAMS:

Q. Did he wait for the train to come up, or was he walking along with the train coming back of him, or how was he relative to the train, just before he was hurt?

94 A. It looked like he was going towards the county bridge when he was grabbing the train. I don't reckon I had my eyes on him half a minute.

Cross-examination.

By Mr. BUFORD:

Q. Mr. Godfrey, you saw Mr. Jacobs come across the railroad?

A. Yes, sir.

Q. Down at the crossing?

A. Yes, sir.

Q. Did you see him stop and make an effort to get on the train?

A. No, sir, not at the crossing.

Q. You don't really know—when your attention was first attracted, he was being knocked down, and dragged, wasn't he?

A. No, sir. My first attention, it looked to me like he was trying to grab the engine up on the cinder pile—and that was not the first attention. The first attention was coming across the railroad, and I took my eyes off him, and didn't notice him any more until it looked like he was trying to grab the engine on the cinder pile.

Q. Kind of stumbling?

A. Yes, sir.

Q. And falling?

A. Yes, sir.

Q. And being knocked down?

A. I didn't see him knocked down until I reckon after his leg was hurt, and the cars were hitting him.

Q. Do you reckon you are mistaken about his leg being hurt?

A. I couldn't tell.

Q. Were you in position to see when he fell?

A. Yes, sir, I was sitting opposite him.

Q. When did you first mark this place on the railroad where you thought he fell?

A. This morning.

Q. So, in fixing any particular place down there where

95 he actually did fall, you are speaking now from recollection of what happened more than eighteen months ago?

A. Yes, sir.

Q. Was your view unobstructed when you saw him fall—you had an unobstructed view of him?

A. I don't understand what you mean.

Q. There was nothing between you and him—you could see him clearly?

A. Yes, sir.

Q. What kind of structure is the well house down there, Mr. Godfrey?

A. A square built place like.

Q. How high is it?
A. The roof and all?
Q. Yes.
A. I judge the top of the roof is fourteen or fifteen feet.
Q. Is it latticed up?
A. It is not latticed around the sides. You can see all the way through the well, if I am not mistaken.
Q. Can you see over it?
A. Yes, sir.
Q. Does not the curbing come up pretty high?
A. The wood part comes up three or four feet.
Q. What apparatus have they got for drawing water?
A. I don't know, sir.
Q. Was it right straight between you and Mr. Jacobs when he fell?
A. No, sir. He was on the left of the well from the porch, the way I was sitting.
Q. You were sitting on the porch, and he was——
A. (Interposing.) To the left of the well.
Q. When he finally fell?
A. Yes, sir.
Q. Are you certain you mean to the right or to the left?
A. The left. The way I was sitting, to my left. The same as I am sitting here, and he was here, and fell to the left of the well (illustrating).
Q. How far from the well?
A. Just about opposite the well.

96 Redirect examination.

By Mr. WILLIAMS:

Q. Now, Mr. Godfrey, look at this map here again. Tell the jury so that they can see where you were sitting.
A. I was sitting just about right along here (indicating).
Q. So that the stenographer can get it, say you were sitting on the left hand side of the porch of the Midway Hotel?
A. I was sitting on the left hand side of the porch of the Midway Hotel.
Q. And you saw him on the cinder pile when he fell?
A. Yes, sir.
Q. And you say he was to the left of that well, which appears in front of that porch?
A. Yes, sir.

W. A. BUTLER, on behalf of the defendant, being duly sworn, testified as follows:

Examined by Mr. WILLIAMS:

Q. Mr. Butler, did you see this accident to Mr. Jacobs in August last?
A. Not when he fell. I didn't see him until afterwards.

Q. Tell what you did see of it?

A. I was sitting on the back porch, you might call it, the porch next to the railroad of the Midway Hotel. I heard some one make a noise, or holler, and I looked and saw some one under the wheels, and his feet were going like that (indicating), trying to get out.

Q. Tell the jury on this map where you were sitting—point it out.

A. This is the porch. I was sitting over this side of the step. Jacobs fell about forty-nine feet from the road or crossing on the east side of the driveway, when I saw him. Where he fell at first I don't know.

Q. How near was he when you first saw him to the middle of the cinder pile?

A. Very near to the middle of it. His shoulder was up on the middle of it, and his feet were down towards the rail.

97 Q. How long have you been living there, Mr. Butler?

A. Three years the first day of last January.

Q. Has that cinder pile been accumulating there, and taken away, and piled up again ever since you have been there?

A. Ever since I have been there.

Cross-examination.

By Mr. BUFORD:

Q. Mr. Butler, what did you say first attracted your attention to this?

A. Somebody hollered, or made a noise of some kind. I was sitting there reading, or writing, on the back.

Q. Some noise of distress?

A. Yes, sir. I looked up and saw Mr. Jacobs. I thought at first it was Mr. Clift Williams. He was on the crew. In fact, I hollered to my wife to phone for the doctor, that I would go there, that Clift Williams was cut all to pieces. I went there, and then saw it was Mr. Jacobs, and went back to the phone, and I could not get central, and Mr. Johnson ran up and got the doctor. He said the doctor stated that central had just rung up.

Q. Nothing attracted your attention before you heard this cry?

A. No.

Q. When you looked, you saw Mr. Jacobs being knocked down, or thrown down?

A. Yes, sir, but I never saw him get under the train. He was on the pile trying to shove back, and I do not think that they turned him over after I saw him.

Q. The cinders were giving, and he was trying to crawl out?

A. I don't know about that. He was on his elbow trying to shove out.

By Mr. PETERSON:

Q. On his back?

A. Yes, on his back. I was the nearest to him, and he turned out.

98 By Mr. BUFORD:

Q. You had not noticed him before you saw him in that position?
A. I might have seen him out there, but I had not noticed him until then.

A. D. FLOWERS, on behalf of the defendant, being duly sworn, testified as follows:

Examined by Mr. WILLIAMS:

Q. Mr. Flowers, how are you engaged now?
A. As supervisor.
Q. Supervisor for whom?
A. Southern Railroad between Lawrenceville and Danville.
Q. How long have you been so engaged?
A. About six years.
Q. Where do you live?
A. Lawrenceville.
Q. Are you familiar with the manner in which the cinders have been piled here, near Lawrenceville, by the passenger trains, during the last six years?
A. Yes, sir.
Q. Tell the jury what is the method and practice of the company with regard to this cinder pile?
A. The trains from the west clean their ash-pans east of the depot, and the trains from the east clean their ash-pans west of the depot, and we clean the cinders out from the track, and throw them out, and they accumulate a load, and then we clean them—that has been for the last ten or twelve years. I have had charge of the road force the last eight years, and have been supervisor the last six years.
Q. Look at this map, and get into your head the location. Here is the Midway Hotel, and here is the passenger depot, and there is the street crossing (indicating on map); I want you to show the jury where, on that map, that cinder pile is located?
A. That cinder pile starts somewhere along here, and runs back down this way—somewhere along here. It starts off from the crossing probably some ten or fifteen feet. It starts gradually, and goes on off the same way.
99 Q. What tracks are there along in that part of the railroad?
A. The main line, and then there is a siding here. We throw them up on both sides—between the siding and main line, and some on this side.

Cross-examination.

By Mr. BUFORD:

Q. You say the cinders were how many feet—ten or fifteen?
A. Somewhere along there, or fifteen or twenty feet.
Q. From the outer edge of the driveway?
A. Yes, sir.
Q. And they extend along down there?
A. Yes, sir.

By Mr. WILLIAMS:

Q. About how far do they extend?
A. About fifty or sixty feet, from one end to the other.

By Mr. BUFORD:

Q. There is a switch signal down next to the overhead bridge?
A. Yes, sir.
Q. All of this is used by the company in making up and shifting its trains, and loading and unloading its trains?
A. Yes, sir, but they hardly ever come down lower than that. They get out a few cars sometimes; sometimes they will get a car out of the house track.
Q. These double tracks are used for the purpose of shifting and making up trains, and loading and unloading freight?
A. This is the main line.
Q. I know that, but this here (indicating on the plat)?
A. Yes, that is the house track.
Q. What do you mean by house track?
A. It is next to the depot. We call it "house track" because we place the cars and put them up next to the house.
Q. The men have to come down as far as the signal post?
A. Yes, to go into the house track.
Q. And operate up and down there, too?
100 A. Yes.
Q. You say until you get a load, you let those cinders accumulate?
A. Yes.
Q. Do you mean a carload?
A. Yes, sir. We have a cinder car on the yard for hauling and handling cinders—a small car.
Q. Have you any cinder pit on the yard?
A. At the shop.
Q. What is a cinder pit?
A. They are used for cleaning engines at the shops. We do not have one on the yard for cleaning passenger engines.
Q. A cinder pit is a pit used by railroad companies?
A. They are not used in cleaning trains in transit, but used for cleaning dead engines.
Q. Are you certain that that cinder pit is not a part of the railroad equipment used by railroads generally?
A. Not for trains in transit. You have got to take them out of the train, and put them over the cinder pit.

Redirect examination.

By Mr. WILLIAMS:

Q. You have been asked about a cinder pit. Please tell the jury, from the standpoint of danger, what would be your judgment about fixing a cinder pit where these cinders were thrown out?

Mr. BUFORD: We simply say that *that* this has nothing whatever

to do with the case. What we were talking about was putting cinders in a pit instead of in a pile.

The COURT: I thought you meant to indicate to the jury that there ought to be a cinder pit there to put the cinders in.

Mr. BUFORD: My question had this object, to ascertain if good management of a railroad did not call for a cinder pit somewhere in which to empty the cinders, instead of piling up a mound of cinders upon the yard. I did not say anything about putting a cinder pit there.

101 The COURT: I overrule the objection.

Mr. BUFORD: Then we except to the question.

A. I think a cinder pit at this point would be more dangerous than the cinder pile. People would be liable to fall into it.

By Mr. WILLIAMS: That is all.

By the COURT: Do you want to ask anything more about cinder pits?

By Mr. BUFORD: No, sir.

By the COURT: If you want to take out your testimony about the cinder pit, I will take out his.

By Mr. BUFORD: No, sir, I do not put it on that ground. We reserve the point.

The defendant rests.

R. B. JACOBS, the plaintiff, recalled, in rebuttal, testified as follows:

Examined by Mr. BUFORD:

Q. Mr. Jacobs, come over here please, sir, and explain this map to the jury. From the points of the compass, that is the way the map is?

A. Yes, sir.

Q. This is on the north side of the track?

A. Yes, sir.

Q. Mr. Butler and Mr. Godfrey think when you fell you were at about that point, which is forty-nine feet from the driveway across the track. Explain to the jury, please, as nearly as you can, where you undertook to get on the train?

A. I come across here, from down in front of Captain Harrison's. Say Captain Harrison's is here (indicating).

Q. Not pointing, it would be further down in front of the switch point?

102 A. Yes. I crossed here, and stopped and waited for the engine, and the engine was pulling out of one of these side tracks, I think this one (indicating on the map). When it came along, I aimed to catch it, and ran along, and made a few steps, and I got on and tripped, and fell on the cinders, and I caught my foot a few steps, and after I lost my balance and fell I held to the engine a good little ways, but I can't tell how far it was down here, and it broke my hold. After it broke my hold, the engine knocked me a good ways.

Q. So you were carried that far in your effort to extricate yourself from the position?

A. Yes, sir, but I was not near the end of the cinder pile when they got me out, because I crawled out myself after the last car pulled over me.

Q. What?

A. I say I don't think I was near the end of the cinder pile.

Q. They put you about half way?

A. The last car rolled over me, and I crawled out on the cinder pile, and lay there until somebody got me.

By Mr. PETERSON:

Q. Do you know how many wheels passed over your legs?

A. I could say how many wheels, but six cars passed over my body.

Q. Over your body?

A. Yes, sir; every car passed over me.

Q. Did you get under the car?

A. I was under there a part of the time. I was across the rail a part of the time, but I got out somehow.

Q. You do not mean the wheels passed over your body?

A. No, sir. I was on the rail, but got out in time to avoid the wheel. I tried to pull myself up the cinder pile, and I got clear of the box, but not of the wheel. It would pull me back, but I got out.

Q. That was after the train had run over your leg?

A. Yes, sir. I didn't know I had lost my leg until I got out. I thought may be it had hit it and bruised it, but I did not know I had lost my leg until I got out.

103 By Mr. BUFORD: We call the court's attention to the Employers' Liability Act. We are through.

The Plaintiff Rests in Rebuttal.

By Mr. WILLIAMS: There was one question I was confident I had asked the witness, but in reviewing the notes of the stenographer I can't find it.

A. D. FLOWERS, recalled, testified as follows:

By Mr. WILLIAMS:

Q. How long have you known the way that these cinders had been piled as you recounted in your testimony?

A. Eleven or twelve years.

Q. You are supervisor here?

A. Yes.

Q. Had any gotten hurt on that cinder pile before Mr. Jacobs?

A. No, sir.

Mr. BUFORD: We object.

The COURT: Is that all you want to ask?

Mr. WILLIAMS: That is all.

The COURT: Stand aside, Mr. Flowers.

Mr. PETERSON: Your Honor notes our objection to that last question. We do not think it is material. Another man may have been lucky.

Mr. BUFORD: Take the Blandford case—no one was hurt there.

Mr. WILLIAMS: One of the questions is whether or not the leaving of these cinders was negligence. That is a question for the jury. If you can show that that same condition of affairs was maintained eleven or twelve years, and nobody has been hurt in all that
104 length of time, it looks now like common sense that it is a matter to be considered by the jury.

The COURT: The jury is discharged until tomorrow morning at ten o'clock, and the objection is overruled.

Mr. PETERSON: Your Honor will note our exception.

End of Testimony.

This is the testimony referred to in bill of exception No. —.

—— ——, *Judge.*

And be it further remembered, and the court doth hereby certify, that the evidence above set out was all of the evidence adduced either for the plaintiff or for the defendant.

And be it further remembered that on the trial of this case, and after the jury had been instructed on the law as appears from Bill of Exceptions No. 2, which is hereby referred to and made a part of this bill of exceptions, the jury retired, and after some time rendered a verdict against the said defendant in words and figures as follows:

"We, the jury, find for the plaintiff and assess his damages at $12,000.00.

W. E. SMITH, *Foreman.*"

And thereupon the defendant, by counsel, moved the court to set aside the verdict of the jury as contrary to the law and the evidence, and for mis-direction of the jury, and for failure to instruct the jury as requested by the defendant, and for errors of the court in rejecting evidence offered by the defendant, and in admitting evidence over the objection of the defendant, and because the verdict was excessive, and the rights of the defendant under the Act of Congress under which this action was brought have been denied, and for other errors appearing on the face of the record. And the court not being advised of its judgment upon the said motion, doth continue the same for argument and decision until the next term of this court.

And at a subsequent term of the said court, to-wit: at the
105 April Term, 1913, the court overruled the said motion of the said defendant for a new trial, and refused to set aside the said verdict and grant a new trial in this case; to which action and ruling of the court in refusing to grant said motion for a new trial, and in refusing to set aside the said verdict, the defendant, by counsel, then and there excepted, and prays that this its Bill of Excep-

tions No. 1, may be signed, sealed, and made a part of the record in this case, and the same is accordingly done.

Given under my hand and seal this the 24th day of April, 1913.

JESSE F. WEST, [SEAL.]
Judge of the Third Judicial Circuit of Virginia.

Bill of Exceptions No. 2.

"Be it further remembered that on the trial of this cause and after the jury had been empanelled and sworn to try the issue joined, and after the evidence had been introduced, which is set out in Bill of Exceptions No. 1, and made a part of the record in this case, which Bill of Exceptions is referred to and made a part of this bill of exceptions just as if it were here again fully set out, the plaintiff, by counsel, moved the court to give to the jury the following instructions numbered 1, 2, 3 and 4:

Instruction No. 1.

The court instructs the jury that if they believe from the evidence that at the time of receiving the injury mentioned in the declaration the plaintiff was employed by the defendant as a fireman upon its freight train number 62, and that the defendant was the proprietor of and used and operated the railroad yard and tracks and roadbed at the town of Lawrenceville for the purposes alleged in the declaration, it was the duty of the defendant to use ordinary care to maintain and keep said railroad tracks and roadbed in a reasonably safe condition for the performance by the plaintiff of the duties required of him in his services as such fireman.

106 *Instruction No. 2.*

The court further instructs the jury that knowledge by the plaintiff of the unsafe character or condition of the said roadway is of itself no defense to an action for injury caused to him thereby. Such knowledge, however, if the jury believe from the evidence that he had such knowledge, may be considered by the jury along with all the evidence in the case in determining whether the plaintiff was himself guilty of negligence, which contributed to produce the injury mentioned in the declaration; but the fact that the plaintiff may himself have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of contributory negligence, if such there were, which they may believe from the evidence was attributable to said plaintiff under the circumstances.

Instruction No. 3.

The court instructs the jury that if they believe from the evidence that at the time of the injury to the plaintiff the said freight train numbered 62 was being shifted and made up on the yards of the

defendant at Lawrenceville, Virginia, preparatory to its departure on its eastward trip to Pinners Point, and that said train included Southern Railway car number 30790, which said car contained certain shipments of freight originating at Oxford, North Carolina, which were to be conveyed by means of said train from the town of Lawrenceville to the town of Emporia, Virginia, or certain shipments of freight originating at Drake's Branch, Virginia, which were to be conveyed by means of the said train from the town of Lawrenceville to Pinners Point, Virginia, in the course of the transportation thereof from the said Drake's Branch to New York City, in the State of New York, or certain shipments of freight originating at Chase City, Virginia, which were to be conveyed by means of said train from the town of Lawrenceville to said Pinners Point, in the course of the transportation thereof from said Chase City, Virginia, to Philadelphia, in the State of Pennsylvania; and that the plaintiff on the occasion in question was employed by the defend-
107 ant as a fireman upon its locomotive engine which was engaged in shifting and making up said train preparatory to its departure from the town of Lawrenceville to Pinners Point, to which said last named place the said train was to be drawn and conveyed by the said locomotive, and that while the plaintiff was so employed he suffered the injury mentioned in the declaration, and that said injury resulted in whole or in part by reason of any defect or insufficiency, due to the negligence of the defendant, in its tracks or roadbed, then they must find for the plaintiff.

Instruction No. 4.

The court instructs the jury that if they find for the plaintiff they should ascertain his damages not to exceed the sum claimed in the declaration, to-wit: $20,000.00; and in estimating such damages the jury may allow such sum as they may believe from the evidence will be a fair compensation for such bodily suffering as the plaintiff may have been caused by the said injury; and they may also allow such sum as may compensate him for the future loss of his earning capacity as far as the jury may believe from the evidence that he has suffered a loss of his earning capacity as a result of said injury; and they may also allow such sum as will enable him to relieve or mollify the inconvenience occasioned by the said injury if they believe from the evidence that he will in the future experience such inconvenience. But if the jury believe from the evidence that the plaintiff was himself guilty of negligence which contributed to cause the said injury, the damages shall be diminished by the jury in proportion to the amount of negligence, if any, which they may believe from the evidence is attributable to the plaintiff.

The defendant, by counsel, objected to the giving of the said instructions Numbered 1, 2, 3 and 4, above set out, respectively, but the Court gave the same, and the defendant excepted severally to the action and ruling of the court in giving the said instructions numbered 1, 2, 3 and 4, as above set out.

108 The defendant thereupon, by counsel, requested the court to give the jury the following instruction, marked "A":

The Court instructs the jury that if they believe from the evidence that the existence of the cinder pile was known to the plaintiff, or that he had been working on the Southern Railway at Lawrenceville for more than a year, and that the cinders had been piled at the same place in the way described by the witnesses for many years prior to the accident, and that the plaintiff had failed to show that he had made complaint or objection on account of the cinder pile, then he assumed the risk of danger from the cinder pile, if there was any danger in it, and the Act of Congress approved April 22, 1908, permits this defense, and the jury should find their verdict for the defendant, but the court refused to give the said instruction marked "A," and the said defendant then and there excepted to the action and ruling of the court in refusing to give the said instruction marked "A."

And thereupon the defendant, by counsel, moved the court to give the following instruction, marked "B":

The court instructs the jury that the gist of this action is negligence on the part of the defendant company, and the burden of proof is upon the plaintiff to show to the satisfaction of the jury by evidence that the defendant company in allowing the cinders to accumulate as shown by the evidence was doing something that was not done by reasonably and well managed railroad companies, under similar circumstances and conditions, and unless they are so satisfied from the evidence, they should find for the defendant. But the court refused to give the said instruction marked "B," and the defendant then and there excepted to the action and ruling of the court in refusing to give the said instruction marked "B."

Thereupon the defendaant, by counsel, moved the court to give the instruction marked "C," as follows:

The Court instructs the jury that this action is brought under the Act of Congress approved April 2, 1908, and the amendments
109 thereto, and before the plaintiff can recover in this action he must show by the evidence that both the plaintiff and the defendant, at the time of the accident were engaged in interstate commerce, which instruction the court gave.

The defendant also moved the court to give to the jury the following instruction, marked "D":

The court instructs the jury that according to the undisputed evidence at the time the accident occurred, the train was engaged in switching cars, and the act of Congress under which this action is brought does not apply to switching movements, and the jury should find their verdict for the defendant, which instruction marked "D" the court refused to give, and to this action and ruling of the court in refusing to give the said instruction marked "D," the defendant then and there excepted.

And thereupon the defendant, by counsel, moved the court to give an instruction marked "E," as follows:

The court instructs the jury that according to the undisputed evidence at the time of the accident the train was engaged in moving cars, Southern No. 136532 and N. Y. P. & N. No. 1352, which cars

were consigned to Emporia and Franklin, Virginia, and both were set off at Emporia, Virginia, all points in Virginia, and there being no evidence that any of the contents of either of these cars originated outside of Virginia, or was destined to any point outside of Virginia, the act of Congress known as the "Employers's Liability Act does not apply and the jury should find their verdict for the defendant. But the court refused to give the said instruction marked "E," and to this action and ruling of the court in refusing to give the said instruction marked "E," the defendant then and there excepted.

And the defendant also moved the court to give an instruction to the jury marked "F," as follows:

The court further instructs the jury that if they believe
110 from the evidence that the cinders piled along the said railroad track at the place of the injury were piled in a manner employed by all well managed railroads, and that they were piled in a reasonably safe manner, and that such method was known to the plaintiff at the time of the injury complained of, and that the plaintiff in returning to his duty from his personal errand, attempted to mount his engine while standing upon the said pile of cinders, and in doing so fell under the train and received the injury complained of, they must find for the defendant; but the court refused to give said instruction marked "F," and to this action and ruling of the court in refusing to give said instruction marked "F" the defendant then and there excepted.

And the defendant, by counsel, also asked the court to give an instruction to the jury marked "G," as follows:

The court instructs the jury that the gist of this action is negligence on the part of the defendant, and the burden of proof is upon the plaintiff to show to the satisfaction of the jury by evidence that the defendant in allowing the cinders to accumulate along the track was guilty of negligence, which said instruction the court gave.

And the court having refused to give an instruction asked for by the defendant, above set out marked "B," the defendant, by counsel, thereupon asked the court to give to the jury an instruction marked "H," as follows:

The court further instructs the jury that if they believe from the evidence that the cinders piled along the said railroad track at the place of the injury were piled in a reasonably safe manner, and that such method was known to the plaintiff at the time of the injury complained of, and that the plaintiff in returning to his duty attempted to mount his engine while standing upon the said pile of cinders, and in doing so fell under the train and received the injury complained of, they must find for the defendant, which instruction marked "H" the court gave.

And the instructions given as above set out were all of the instructions given by the court.

111 & 112 And the defendant now prays that this its second Bill of Exceptions may be signed, sealed and made a part of the record, and the same is accordingly done.

Given under my hand and seal this the 24th day of April, 1913.

JESSE F. WEST, [SEAL.]

Judge of the Third Judicial Circuit of Virginia.

Exhibit "A" filed with deposition of P. Nelson, diagram of tracks, etc., near the scene of the accident.

I hereby certify that the foregoing is a true copy of the record in the case of Ralph B. Jacobs v. Southern Railway Company.
Teste:

W. T. SLEDGE, *Clerk.*

I hereby certify that the notice required by Section 3457 Code of Virginia, was given to Buford, Lewis & Peterson, attorneys for the plaintiff, by the attorneys for the defendant company before the transcript of the record aforesaid was made out.
Given under my hand this 23rd day of April, 1913.

W. T. SLEDGE, *Clerk.*

Clerk's Fee for copy of record $35 20-100.

A Copy.
Teste:

H. STEWART JONES, *C. C.*

113 SOUTHERN RAILWAY COMPANY
v.
JACOBS.

(RICHMOND, March 12, 1914.)

KEITH, *P.:*

This suit was brought under the act of Congress, approved April 22, 1908, known as the "Employers' Liability Act," to recover of the Southern Railway Company damages for injuries sustained by the plaintiff while in the service of the company as fireman on a freight train running between Lawrenceville and Pinners Point, Va. There was a verdict and judgment for the plaintiff, to which a writ of error was awarded.

The declaration shows that the defendant was, at the time of the injuries complained of, a common carrier engaged in interstate commerce; that the plaintiff was employed by the defendant in that commerce; and that the railway company permitted a pile of cinders to accumulate alongside its track and roadbed at Lawrenceville, which constituted a defect or insufficiency, due to its negligence, in its track or roadbed, which brings the case within the purview of the first section of the act of Congress above referred to.

Three questions of interest are presented for decision by the record. First: Was the plaintiff in error, at the time of the injury, engaged in commerce between the States, and was the defendant in error a person employed by the plaintiff in error in such
114 commerce, within the purview of the act of Congress? Second: Did the cinder pile alongside the tracks of the company in its yard at Lawrenceville constitute a defect or insufficiency due to its negligence in its track or roadbed, from which the injury to

the defendant in error resulted, in whole or in part? Third: Is the plaintiff in error entitled, under the act of Congress, to avail itself of the common law defense which defeated recovery if the defendant in error was chargeable with actual or constructive knowledge of the negligence of the plaintiff in error in creating the defect or insufficiency in its track or roadbed?

It is true that at the precise moment of the injury, Jacobs, the man who was injured, was engaged with a crew in shifting cars in the yard at Lawrenceville, and the particular cars which were attached to the engine at the moment of the accident were engaged in intrastate, as contradistinguished from interstate, commerce, and did not come from any point beyond the limits of the state, and were destined to points within the state; but it is also true that the shifting and movement of the cars at the time had for its object the making up of a train to which cars were to be attached which came from points beyond the southern limits of the state and were destined to points beyond the northern limits of the state, by way of Norfolk, and were laden with interstate shipments; and these facts, we think, bring the case fairly within the influence of Pederson v. Delaware, Lackawanna & W. R. Co., 229 U. S., 57 L. ed. 1125, and the circuit court committed no error in so deciding.

Nor have we any difficulty in holding that, under the cir-stances, the cinder pile alongside the tracks of the company constituted a defect due to the negligence of the company, from which the injury to the appellee resulted, and was a question of fact for the jury upon proper instructions. And this brings us to the interesting and important question upon the decision of which this controversy must turn.

So much of the act of Congress as is material to our present purpose is as follows:

Section 1 declares that "Every common carrier by railroad while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states and territories, or between
115 the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment."

SEC. 3. "That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence

shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

SEC. 4. "That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation of such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

It seems to be agreed, and we are of opinion rightly so, that this act was passed by Congress to constitute the law governing the liability of railway companies to their employees; that it was passed by Congress in pursuance of the commerce clause of the Constitution, which clothes it with authority and imposes upon it the duty to regulate commerce with foreign nations, among the several states and with the Indian tribes. Until a recent period Congress had not carried this power into execution, but it had been left to
116 the control of the several states through their legislatures and courts. When Congress, however, did act upon the subject, its authority was complete and exclusive.

To the act, then, we must look for the law governing the liability of railroads and their employees inter sese, and in order to determine their relative privileges, duties and obligations. It in itself and of itself constitutes the sole and supreme law as to the subjects upon which it touches, and is not to be pieced out by reference to state legislation.

In Mich. Cent. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, Mr. Justice Lurton, speaking for the Supreme Court, said: "By this act Congress has undertaken to cover the subject of the liability of railroad companies to their employees injured while engaged in interstate commerce. This exertion of a power which is granted in express terms must supersede all legislation over the same subject by the states." And speaking with reference to the police power of the state, the opinion, continuing, says: "No urgency for its use can authorize a state to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of Congress by the Constitution. * * * It therefore follows that in respect of state legislation prescribing the liability of such carriers for injuries to their employees while engaged in interestate commerce, this act is paramount and exclusive, and must remain so until congress shall again remit the subject to the reserved police power of the states."

Indeed, counsel for defendant in error, in his brief, states the law upon the subject with propriety. "The act of Congress provides a complete system of liability, which, since the amendment of 1910, does not need to be pieced out, and, indeed, cannot be pieced out by resorting to the local statutes of the state of procedure, or that of

the injury. The act is one which relates to the liability of railroad companies engaged in interstate commerce to their employees while engaged in such commerce. The power of Congress to deal with the subject comes from its power to regulate commerce between the states, and when exercised is exclusive of the law of the states."

The field having been occupied by Congress by the passage of the law which we have quoted, and the law which it has passed being exclusive of all others, it only remains to ascertain whether
117 or not, in the record before us, the judgment complained of has been reached in obedience to and conformity with the provisions of that law.

The objection to the first instruction given by the court at the instance of the plaintiff is not, we think, well taken. It states the law correctly and there was evidence to support it.

The second instruction given by the court over the objection of the railway company is as follows: "The court further instructs the jury that knowledge by the plaintiff of the unsafe character or condition of the said roadway is of itself no defense to an action for injury caused to him thereby. Such knowledge, however, if the jury believe from the evidence that he had such knowledge, may be considered by the jury along with all the evidence in the case in determining whether the plaintiff was himself guilty of negligence which contributed to produce the injury mentioned in the declaration; but the fact that the plaintiff may himself have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of contributory negligence, if such there were, which they may believe from the evidence was attributable to said plaintiff under the circumstances."

Instruction "A" asked for by the plaintiff in error and refused by the court is as follows: "The court instructs the jury that if they believe from the evidence that the existence of the cinder pile was known to the plaintiff, or that he had been working on the Southern railway at Lawrenceville for more than a year, and that the cinders had been piled at the same place in the way described by the witnesses for many years prior to the accident, and that the plaintiff had failed to show that he had made complaint or objection on account of the cinder pile, then he assumed the risk of danger from the cinder pile, if there was any danger in it, and the act of Congress approved April 22, 1908, permits this defense, and the jury should find their verdict for the defendant."

The contention of plaintiff in error is, that the court erred in giving instruction No. 2, as above set forth, and in refusing to give the instruction marked "A" as requested by it.

Instruction No. 2 deals with two propositions: First, the doctrine of assumed risk; and, secondly, with that of contributory negligence. With respect to the latter subject, the instruction seems to be
118 in accordance with section 3 of the Employers' Liability Act, which declares, that although the employee may have been guilty of contributory negligence, that fact shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

The objection urged to the instruction is to the first clause of it, which tells the jury that knowledge by the plaintiff of the unsafe character or condition of the roadway is of itself no defense to an action for injury caused thereby.

Under the Virginia law the instruction in this respect would be free from objection, for our Constitution, adopted in 1902, declares that, "Knowledge, by any such railroad employee injured, of the defective or unsafe character or condition of any machinery, ways, appliances or structures, shall be no defense to an action for injury caused thereby," which wholly destroys the defense of assumed risk as applied to railroad employees. The language of the act of Congress is far otherwise. Section 4 declares that in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to or the death of any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute, enacted for the safety of employees contributed to the injury or death of such employee."

The contention of defendant in error is, that the risks assumed in contemplation of this act are such as are inherent to the work in which the employee is engaged, and such as cannot be foreseen and prevented by the exercise of ordinary care upon the part of the employee; that it was not intended to embrace such risks as flow from any negligent act on the part of the employer, or of any of its officers, agents or employees, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment, but that as to such acts of negligence the employer is under an absolute liability by force of the first section of the act, and in support of this contention relies in part upon the precise form of the term used in the act, which does not speak of "assumption of risks," but uses the phrase, the employee shall not be held to
119 have "assumed the risks." But this change merely in the order of the words used cannot have any important bearing, we think, on the construction of the statute; "Assumption of risks," and "assumed the risks" of his employment being equivocal modes of stating an identical proposition. It is a phrase which has acquired a definite technical meaning, nowhere more vigorously enforced than in the decisions of the Supreme Court of the United States.

In Texas Pacific R. Co. v. Archibald, 170 U. S. 665, the Supreme Court said: "The elementary rule is that it is the duty of the employer to furnish appliances free from defects discoverable by the exercise of ordinary care, and that the employee has a right to rely upon this duty being perform and that whilst, in entering the employment, he assumes the ordinary risks incident to the business, he does not assume the risk arising from the neglect of the employer to perform the positive duty owing to the employee with respect to appliances furnished. An exception to this general rule is well established, which holds that where an employee receives for use a defective appliance, and with knowledge of the defect continues to use it without notice to the employer, he cannot recover for an injury

resulting from the defective appliance thus voluntarily and negligently used."

In Words & Phrases, under the title "Assumption of Risk," many authorities are collated, all of which confirm the doctrine as stated in the case just cited. It is a doctrine wholly distinguishable from that of contributory negligence, which is a breach of legal duty imposed by law upon the servant, however unwilling or protesting he may be, and differs from the assumption of risk which is not a duty, but merely voluntary upon the part of the servant. Dempsey v. Sawyer, 95 Maine 295.

In Schlemmer v. Buffalo, R. & P. Ry. Co., 205 U. S. 1, 51 L. Ed. 681, dealing with the subject of assumption of risk, it is said: "Whether an actual assumption by contract was supposed on grounds of economic theory, or the asumption was imputed because of a conception of justice and convenience, does not matter for the present purpose. * * * But, at the present time, the motion is not confined to risks of such negligence. (That is to say, negligence necessarily incident to the employment.) It is extended, as in this statute it plainly is extended, to dangerous conditions, as of machinery, premises, and the like, which the injured party understood and appreciated when he submitted his person to them. In this class of cases the risk is said to be assumed because a person who freely and voluntarily encounters it has only himself to thank if harm comes, on a general principle of our law."

It is true that the employee does not assume the risk of negligence upon the part of his employer. This court so held in Black v. Va. Portland Cement Co., 104 Va. 450, where it was said that "failure on the part of the master to observe, for the protection of his servant, that reasonable degree of care which the circumstances of the particular case justly demand is actionable negligence, and is not within the influence of the doctrine of assumed risks." That case arose upon a demurrer to the declaration, which stated that the plaintiff was in the employment of the defendant, who was engaged in quarrying rock; that the defendant, whose duty it was to keep its quarry in a reasonably safe condition, knowingly permitted a stone to remain in a position from which it was liable to fall at any time, and that it did fall, on a day stated, upon the plaintiff who was ignorant of the danger, and in the exercise of due and proper care, and caution, by reason of which the injury complained of was inflicted. The demurrer to the declaration was overruled, and in the course of the opinion the court said: "Every fact here stated is upon demurrer to be taken as true,—that the rock which inflicted the injury was in a position from which it was liable to fall; that the master knew this fact, and negligently permitted it to remain; and that the servant, ignorant of the situation, remained at work in the quarry in the due course of his employment, and, while in the performance of his duty, received the fatal injury." The exact point of the decision being, that the danger was known to the master and not known by or communicated to the employee.

Cases might be multiplied to any extent to show that the doctrine of assumed risks covers more than those risks which are ordinarily

incident to the business, and embraces the use of defective appliances, and work of almost every description where the employee with knowledge of the defect continues to use it without notice to the employer.

Upon this point see Choctaw & Gulf Ry. Co. v. McDade, 191 U. S. 64, where it is said, that "An employee assumes the risk of injury from defective appliances furnished by his employer only
121 when the defect is known to, or plainly observable by, the employee."

When in section 3, Congress deals with contributory negligence, it forbids that defense wholly in cases where the common carrier has violated a statute enacted for the safety of its employees and such violation contributed to the injury or death of the employee. The same idea runs through section 4, and the doctrine of assumed risks is wholly excluded where the danger arose from the violation by the common carrier of a statute enacted for the safety of the employee. The language employed is plain and easy to be understood, and leaves, we think, except in the particular mentioned, the defense of assumption of risks in full force and vigor. The subject has been considered in numerous cases.

In Freeman v. Powell, decided by the court of Civil Appeals of Texas, 144 S. W. 1033, an employee of an intrastate railroad company, engaged in preparing ice for use in passenger cars carrying interstate passengers, was engaged in interstate commerce; and hence the company's liability to him for personal injuries received in the work is governed by the Act of Congress, approved April 22, 1908, under which the assumption of risk is available, unless the injury was caused by the employer's violation of a statute enacted for the safety of employees. In that case the trial court found that the employee did not assume the risk arising from the failure to furnish certain needed appliances, but the appellate court was of opinion that in the absence of a statute affecting the question, the employee, under the facts of the case, had assumed the risk. "It is insisted, however," said the appellate court, "that the trial court's conclusion to the contrary is correct, because of the act of the legislature of the state of Texas, which forbids the plea of assumed risks in certain cases." "If," said the court, "the above act applies the findings of *of* the trial court have some support in the evidence; but we are of the opinion that the rights of the parties are to be determined by the provisions of the act of April 22, 1908, passed by the Congress of the United States." And section 4 is referred to, which we have already copied in this opinion. The Texas court referring to that section said as follows: "It thus appears that under the Federal statute a complaining employee to whom the act applies is not relieved from the operation of the ordinary rule of assumed risk, except in cases where there is a violation by the carrier of some statute enacted
122 for the safety of an employee which has contributed to his injury or death, and of this there is no contention in this suit. In the respect just noted, the act of Congress conflicts with the State's statute which we have quoted. The power of Congress over

interstate commerce is not an open question, and it extends to all agencies and instrumentalities by or through which it is carried on."

The point of resemblance between this case and the case before us will at once be observed. In both cases the state gave exemption from the operation of the doctrine of assumed risks in language which permitted a wider scope than that of the Act of Congress upon the same subject.

In Bowers v. Southern Ry. Co., 73 S. E. 677, it was held that, "the servant may assume the risk as in other employments, except as to such things as are violative of statutes enacted for the securing of the servant's safety."

In Barker v. Kansas City M. & O. Ry. Co., 129 Pac. 1151, the Supreme Court of Kansas held, that "The assumption of risk is a good defense to an action under this act, except when the violation by the carrier of some statute enacted for the safety of employees has contributed to the injury or death of the employee. And, when such defense is pleaded and supported by the evidence, it is the duty of the court to instruct thereon."

In Central Vermont Ry. Co. v. Bethune, 206 Fed. 868, where section 4 of the Employers' Liability Act was construed, it was held, that the section "limited the abrogation of the doctrine of assumed risk in such cases to instances where the violation of an express statutory duty by the carrier was charged, and hence such doctrine was applicable to an action under the statute for the death of a railroad employee engaged in interstate commerce resulting from the alleged negligence of the railroad company in constructing its tracks too close together."

In Gulf, Colorado &c. Ry. Co. v. McGinnis, 228 U. S. 173, 57 L. ed. 785, the principal question before the court seems to have been as to the persons who could claim the benefit of the Federal Employers' Liability Act; but in the course of its opinion the court said: "It has also been assigned as error that the defense of assumed risk was, in legal effect, denied, because the court overruled a motion to instruct a verdict for the defendant. The defense of assumed
123 risk was submitted to the jury under a full and fair general charge."

In Mondou v. N. Y., N. H. & H. R. Co., 223 U. S. 1, 56 L. ed. 327, the opinion delivered by Mr. Justice Van Devanter and concurred in by the entire court is most instructive as to many features of the case under consideration. He enumerates the departures from the common law made by portions of the act, and when he comes to that rule that involves the assumption of risks, he says: "The rule that an employee was deemed to assume the risk of injury, even if due to the employer's negligence, where the employee voluntarily entered or remained in the service with an actual or presumed knowledge of the conditions out of which the risk arose, is abrogated in all instances where the employer's violation of a statute enacted for the safety of his employees contributed to the injury." In the course of his opinion he says: "True, prior to the present act, the laws of the several states were regarded as determinative of the liability of employers engaged in interstate commerce for injuries received by

their employees while engaged in such commerce. But that was because Congress, although empowered to regulate that subject, had not acted thereon, and because the subject is one which falls within the police power of the states in the absence of action by Congress."

In Seaboard Air Line Railway v. Moore, 228 U. S. 433, 57 L. ed. 907, in an opinion of the court by the Chief Justice, it is said: "It is pressed upon our attention that the court decided and erred in deciding that the employers' liability law abolished, as to all cases coming under its provisions, the defense of assumption of risk, and, also, that a railroad employee injured in the course of his employment could avail of the benefits of the statute, although at the time he sustained the injury he was not actually engaged in interstate commerce. But we think it is plain that the contentions last stated are without merit, and that the only even pretext afforded for their assertion arises from a misconception of the opinion below, which we think despite its meagre and maybe inadequate examination of the case, nevertheless on its face rebuts the inferences which the contentions attempt to draw from it. It is unnecessary to recur to the text of the opinion to demonstrate the conclusion just stated, because in any event the contentions must be overruled, since the benefit of the defense of assumption of risk was accorded to the railway company at the trial, and the right of the plaintiff to recover was made dependent upon his establishing that at the time he was injured he was actually engaged in interstate commerce."

Upon the whole case, we are of opinion that the court erred in giving instruction No. 2, as asked for by the defendant in error, and in refusing to give instruction "A," asked for by plaintiff in error. We think that the decisions to which we have referred and especially those of the Supreme Court of the United States, show very plainly that the fourth section of the Employers' Liability Act does not wholly do away with the defense of assumption or risk, but that it still constitutes a defense, except in those cases where the violation by the common carrier of some statute enacted for the safety of the employee contributed to his injury or death.

What the future may bring forth as to the true exposition of the statute remains in the breast of the gods; we can only deal with their recorded utterances.

The judgment must, therefore, be reversed, the verdict of the jury set aside, and the cause remanded for a new trial.

Reversed.

124 VIRGINIA:

In the Supreme Court of Appeals, Held at the Library Building, in the City of Richmond, on Thursday, the 12th Day of March, 1914.

SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
against
RALPH B. JACOBS, Defendant in Error.

Upon a Writ of Error and Supersedeas to a Judgment Rendered by the Circuit Court of Brunswick County on the 24th Day of April, 1914.

This day came against the parties, by counsel, and the court having maturely considered the transcript of the record of the judgment aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the said judgment is erroneous. It is therefore considered that the same be reversed and annulled, the verdict of the jury set aside and a new trial awarded, and the cause is remanded for a new trial to be had therein.

And it is further ordered that the plaintiff in error recover of the defendant in error its costs by it expended in the prosecution of its writ of error and supersedeas aforesaid here.

Which is ordered to be certified to the said circuit court.

A copy,
Teste:

H. STEWART JONES, *Clerk*.

125 VIRGINIA:

In the Supreme Court of Appeals, Held at the Library Building, in the City of Richmond, on Thursday, the 19th Day of March, 1914.

SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
against
RALPH B. JACOBS, Defendant in Error.

Upon a Petition to Rehear.

This day came the defendant in error, by counsel, and moved the court to set aside the judgment entered herein on the 12th day of March, 1914, and grant a rehearing thereof; but, because the court here is not yet advised of its judgment to be given in the premises, time is taken to consider thereof.

A copy,
Teste:

H. STEWART JONES, *C. C.*

126 VIRGINIA:

In the Supreme Court of Appeals, Held at the Court House of Wythe County, in the Town of Wytheville, on Monday, the 15th Day of June, 1914.

SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
against
JACOBS, Defendant in Error.

Upon the Petition of Defendant in Error for a Rehearing of the Judgment of this Court in This Case Rendered at the March, 1914, Term Thereof.

This day came again the parties, by counsel, and the Court having maturely considered the petition aforesaid, is of opinion that this petition should not be granted. It is, therefore, considered that a re-hearing of this cause be denied.

A copy,
Teste:

J. M. KELLY, *C. C.*

127 To the Honorable Judges of the Supreme Court of Appeals of Virginia:

Your petitioner, Ralph B. Jacobs, respectfully represents that he is aggrieved by a final judgment of the circuit court of the county of Brunswick, rendered on September 3, 1914, in a certain action at law pending in said court under the style of Ralph B. Jacobs v. Southern Railway Company, wherein your petitioner was plaintiff and the Southern Railway Company, a corporation, was defendant.

Statement of the Case.

This is the sequel to the case of Southern Railway Company v. Ralph B. Jacobs, lately pending in your Honorable Court, and in which by a judgment rendered on March 12, 1914, this Honorable Court reversed a judgment which had previously, to-wit: on April 24, 1913, been rendered in favor of your petitioner by the said circuit court for the sum of $12,000.00, with interest thereon from March 5, 1913.

A printed transcript of the record presented by the said Southern Railway Company with its petition for writ of error to the judgment aforesaid in favor of your petitioner, is now on file in the office of the clerk of your Honorable court, and is here referred to and
128 made a part of this petition; and a transcript of the record of the proceedings subsequent to the judgment aforesaid of this Honorable court, including the judgment herein complained of, is presented herewith as a part of this petition. The record of the former trial is referred to as R. No. 1, and the transcript of the record herewith filed is referred to as R. No. 2.

This action was brought by your petitioner under the provisions of the act of Congress approved April 22, 1908, known as the Employers' Liability Act to recover of the defendant damages for an injury suffered by your petitioner while in the service of the defendant. The declaration setting forth your petitioner's cause of action is to be found on pages 14-25, inclusive, of R. No. 1.

The second trial, had pursuant to the judgment of your Honorable court rendered on March 12th, 1914, resulted in a verdict in favor of the defendant and the judgment in its favor rendered by the said circuit court on September 3rd, 1914, herein complained of. Your petitioner is advised that said judgment is erroneous, and assigns the following errors therein.

Assignments of Error.

1. The court erred in refusing to give to the jury instruction No. 3 requested by your petitioner and set forth in his bills of ex-
129 ceptions Nos. 1 and 3 (R. No-. 2, 4, 11).

This instruction, your petitioner submits, correctly states the law in so far as the first section of the said Act of Congress makes the negligence of any of the officers, agents or employes of the defendant the basis of recovery for an injury resulting in whole or in part from such negligence.

2. The court erred in refusing to give to the jury instruction No. 4 requested by your petitioner and set forth in his bills of exceptions Nos. 1 and 4 (R. No-. 2, 5, 13).

This instruction, your petitioner respectfully submits, correctly states the law in so far as the first section of said act of Congress makes any defect or insufficiency in the railroad track or roadbed of the defendant, due to the negligence of the defendant, the basis of recovery for injury resulting in whole or in part from such defect or insufficiency.

3. The court erred in refusing to give to the jury instruction No. 5 requested by your petitioner and set forth in his bills of exceptions Nos. 1 and 5 (R. No-. 2, 5, 15).

This instruction, your petitioner respectfully submits, correctly states the law under said act of Congress with respect to the extent to which the plaintiff's knowledge of the existence of the pile
130 of cinders affects his right of recovery for the injury sustained by him and resulting in whole or in part from the negligence of the officers, agents or employes of the defendant, or from any defect or insufficiency due to its negligence in its railroad track or roadbed.

4. The court erred in refusing to give to the jury instruction No. 6 requested by your petitioner and set forth in his bills of exceptions Nos. 1 and 6 (R. No-. 2, 6, 17).

This instruction, your petitioner respectfully submits, correctly states the law with respect to the doctrine of contributory negligence as applicable to this case.

5. The court erred in giving to the jury at the request of the de-

fendant its instruction marked "A," and set forth in his bill of exceptions No. 2 (R. No-. 2, 8).

Your petitioner respectfully submits that this instruction should not have been given to the jury for these two reasons:

(*a*) That the common law defense of assumption of risk is not an available defense in bar of recovery for any liability created and imposed by the first section of the act of Congress; and

(*b*) That said instruction marked "A" does not correctly state the common law doctrine of assumption of risk.

131 6. The court erred in over-ruling the motion of your petitioner to set aside the verdict of the jury and award him a new trial as set forth in his bill of exceptions No. 7 (R. No. 2, 19-98).

Your petitioner respectfully submits that every fact necessary to entitle him to recover is established by the evidence set out in said bill of exception; and he desires to call the attention of the court to the fact that the present construction by the trial court of the act of Congress is indicated by the fact that it gave to the jury upon the trial only instructions Nos. 1, 2 and 7, requested by your petitioner, and it gave to the jury instructions marked "A", "G" and "H", asked for by the defendant, which instructions so given by the court to the jury are set out in said bill of exceptions No. 7 (R. No. 2, 96-7). Your petitioner respectfully submits that if the instructions so given by the court constitute a proper exposition of the act of Congress, it is indeed an abortive piece of legislation.

7. The court erred in over-ruling the motion of your petitioner to set aside the verdict and grant him a new trial upon the ground that the court erred in refusing to give to the jury said instructions numbered 3, 4, 5 and 6, requested by your petitioner, as set forth in his bill of exceptions No. 8 (R. No. 2, 99).

132 8. The court erred in overruling the motion of your petitioner to set aside the verdict and award him a new trial upon the ground that the court erred in giving to the jury said instruction marked "A", requested by the defendant and set forth in his bill of exceptions No. 9 (R. No. 2, 100).

For these and other errors apparent upon the face of the record, your petitioner respectfully prays that a writ of error and supersedeas to the judgment complained of may be awarded him, and that the said judgment may be reviewed and reversed by your Honorable court. And, as in duty bound, he will ever pray, etc.

Respectfully submitted,

RALPH B. JACOBS, *Petitioner.*
By COUNSEL.

BUFORD, LEWIS AND PETERSON,
Attorneys for Petitioner.

VIRGINIA,
Brunswick County, To wit:

I, E. P. Buford, an attorney at law, practicing in the Supreme Court of Appeals of Virginia, do certify that in my opinion the

judgment complained of in the foregoing petition should be reviewed and reversed by the said Supreme Court of Appeals.

133 Given under my hand this 6th day of November, 1914.

E. P. BUFORD.

134 VIRGINIA:

Pleas at the Court-house of the County of Brunswick, Before the Circuit Court of said County, on the 3d Day of September, 1914.

Be it remembered, that heretofore, to-wit: In the clerk's office of the Circuit court of the County of Brunswick, Virginia, on the 16th day of June, 1914, the following order of the Supreme Court of Appeals of Virginia was received and accordingly entered:

VIRGINIA:

In the Supreme Court of Appeals, Held at the Library Building, in the City of Richmond, on Thursday, the 12th Day of March, 1914.

SOUTHERN RAILWAY, Plaintiff in Error,
against
RALPH B. JACOBS, Defendant in Error.

Upon a Writ of Error and Supersedeas to a Judgment Rendered by the Circuit Court of Brunswick County on the 24th Day of April, 1913.

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record of the judgment aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the said judgment is erroneous. It is therefore considered that the same be reversed and annulled, the verdict of the jury set aside and a new trial awarded, and the cause is remanded for a new trial to be had therein.

And it is further ordered that the plaintiff in error recover of the defendant in error its costs by it expended in the prosecution of its writ of error and supersedeas aforesaid here.

Which is ordered to be certified to the said circuit court.

A copy.

Teste:

H. STEWART JONES, *C. C.*

Def't in Error's Costs.

Att'y's fee	$20.00
Clerk's fees	2.59
	$22.59

135 Teste:

H. STEWART JONES, *C. C.*

Teste:

W. T. SLEDGE, *Clerk.*

And, at another day, to-wit: At a circuit court continued and held for the county aforesaid, on Thursday, June 25, 1914, the following order was entered:

On motion of the plaintiff, it is ordered that this case be and the same is hereby set for trial on the first day of the September term, 1914, of this court, at ten o'clock, a. m.

And, now at this day, to-wit: at a circuit court held for the county aforesaid on Thursday, the 3d day of September, 1914, the following order was entered:

This day came again the parties, by counsel, and also a jury, namely: J. A. Reese, R. B. Spence, J. W. Pritchett, G. W. Wesson, C. W. Turner, W. M. McAden, and J. R. Showalter, and the jury having been duly sworn and empanneled according to law, to try the issue joined, and having heard the evidence and arguments of counsel, and the instructions of the court, rendered a verdict in words and figures as follows: "We, the jury, find for the defendant, W. M. McAden, foreman," and thereupon, the plaintiff, by counsel, in apt time moved the court to set aside the verdict of the jury and grant him a new trial upon the grounds; (1) that the verdict is contrary to the law and the evidence: (2) For error of law committed by the court in refusing to give instructions numbered 3, 4, 5, and 6, requested by the plaintiff: and (3) for error of law committed by the court in giving, over the plaintiff's objection, instruction marked A, requested by the defendant: which motion the court doth overrule and doth decline to set aside the said verdict and grant the plaintiff a new trial.

And thereupon, it is considered by the court that the plain-
136 tiff take nothing by his writ, and that the defendant go thereof without day, and recover of the plaintiff its costs in this behalf expended.

MEMORANDUM.—During the progress of this trial, the plaintiff noted sundry exceptions, to the rulings of the court, and thereupon, tendered to the court his several bills of exceptions numbered, 1, 2, 3, 4, 5, 6, 7, 8 & 9, resp-tively, which he prays the court to sign, seal, enroll and make a part of the record in this cause, which is thereupon accordingly done."

VIRGINIA:

Circuit Court of Brunswick County.

RALPH B. JACOBS
v.
SOUTHERN RAILWAY COMPANY.

Bill of Exceptions No. 1.

Be it remembered that on the trial of this case, after the plaintiff to sustain the issue on his part, and the defendant to sustain the issue on its part, had, respectively, introduced before the jury, the evi-

dence set forth in plaintiff's bill of exceptions No. 7, which is here referred to and made a part of this bill of exceptions as fully as if the said evidence were herein set forth at length, the plaintiff, by counsel, moved the court to give to the jury certain instructions, numbered 1, 2, 3, 4, 5, 6 & 7, in the following words:

"(1) The court instructs the jury, as a matter of law, upon the uncontradicted evidence in this case, that at the time the plaintiff received the injury, mentioned in the declaration, the defendant was a common carrier by railroad engaging in interstate commerce, and that the plaintiff was a person employed by the defendant, as such common carrier in such commerce, and that this action is governed by and is to be determined in accordance with, the provisions of the Act of Congress, approved April 22, 1908, known as the Employers' Liability Act.

137 "(2) If the jury believed from the evidence that at the time of receiving the injury mentioned in the declaration the plaintiff was employed by the defendant as a fireman upon its freight train No. 62, and that the defendant was the proprietor of and used and operated the Railroad yards, the tracks and roadbed at the town of Lawrenceville for the purposes alleged in the declaration, it was the duty of the defendant to use ordinary care to maintain and keep said railroad tracks and roadbed in a reasonably safe condition for the performance by the plaintiff of the duties required of him in his services as such fireman."

"(3) If the jury believes from the evidence that the officers, agents, and employees of the defendant, or any of them, negligently caused, suffered or permitted the pile of cinders mentioned in the declaration to be placed, and to be, remain and accumulate upon and alongside the main line of its railroad track or roadbed upon its railroad yard at the town of Lawrenceville, in dangerous proximity to the said railroad track, and that the plaintiff suffered the injury mentioned in the declaration, and that such injury resulted in whole or in part from the negligence of the said officers, agents and employees of the said defendant, or any of them, in so negligently causing, suffering or permitting the said pile of cinders, to be placed, and to be, remain and accumulate, upon and alongside the said railroad track or roadbed as aforesaid, they should find for the plaintiff.

"(4) If the jury believe from the evidence that the defendant, through its officers, agents and employees, or any of them, negligently caused, suffered or permitted the pile of cinders mentioned in the declaration, to be placed and to be, remain and accumulate upon and alongside the main line of its railroad track or roadbed, upon its railroad yard, at the town of Lawrenceville, in dangerous proximity to the said railroad track or roadbed, and that *side* pile of cinders constituted a defect or insufficiency in the said rail-

138 road track or roadbed of the said defendant, due to the negligence of the said defendant, and that the plaintiff suffered the injury mentioned in the declaration, and that such injury resulted in whole or in part from such defect or insufficiency in the said railroad track or roadbed, due to the negligence of the said

defendant as aforesaid, in so negligently causing, suffering or permitting the said pile of cinders to be placed and to be, remain and accumulate upon and alongside the said railroad track or roadbed, as aforesaid, they should find for the plaintiff."

"(5) The fact that the plaintiff may have had knowledge of the existence of the pile of cinders mentioned in the declaration is not a bar to an action for injury caused to him thereby. Such knowledge, however, if the jury believe from the evidence that he had such knowledge, may be considered by the jury along with all the evidence in the case in determining whether the plaintiff was himself guilty of negligence, which contributed to produce the injury mentioned in the declaration; but the fact that the plaintiff may himself have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of contributory negligence, if such there were, which they may believe from the evidence was attributable to said plaintiff under the circumstances."

"(6) In order to charge the plaintiff with contributory negligence, which the jury are to consider in mitigation of damages, the jury must believe from the evidence not only that the plaintiff knew of the existence of the pile of cinders, but also *of* the danger occasioned by the said pile of cinders was known to him, or was so obvious that a man of ordinary prudence would have appreciated such danger, and not have attempted as the plaintiff did, to get upon the engine at the time and under the circumstances disclosed by the evidence.

"(7) If the jury find for the plaintiff they should ascertain his damages not to exceed the sum claimed in the declaration to-wit:
\$20,000.00; and in estimating such damages the jury may
139 allow such sum as they may believe from the evidence will be a fair compensation for such bodily suffering as the plaintiff may have been caused by the said injury; and they may also allow such sum as may compensate him for the future loss of his earning capacity as far as the jury may believe from the evidence that he has suffered a loss of his earning capacity as a result of said injury; and they may also allow such sum as will enable him to relieve or mollify the inconvenience occasioned by the said injury if they believe from the evidence that he will in the future experience such inconvenience. But if the jury believe from the evidence that the plaintiff was himself guilty of negligence which contributed to cause the said injury, the damages shall be diminished by the jury in proportion to the amount of negligence, if any, which they may believe from the evidence is attributable to the plaintiff."

To the giving of which several instructions, the defendant, by counsel, objected, and the court gave to the jury instructions numbered 1, 2, and 7, respectively, but refused to give instructions numbered 3, 4, 5 and 6, respectively, to which action and ruling of the court in refusing to give to the jury instructions numbered 3, 4, 5 and 6, respectively, and to the action and ruling of the court in refusing to give to the jury each of said instructions numbered

3, 4, 5 and 6, the plaintiff, by counsel, then and there duly excepted, upon the following grounds, to-wit:

(1) That instruction number 3 correctly states the law in so far as the first section of the act of Congress approved April 22, 1908, known as the Employers' Liability Act, makes the negligence of any of the officers, agents or employes of the defendant the basis of recovery for an injury to the plaintiff, resulting in whole or in part from such negligence;

(2) That instruction number 4 correctly states the law in so far as the first section of the said act of Congress makes any defect or insufficiency in the railroad track or roadbed of the defendant, due to the negligence of the defendant, the basis of recovery for
140 the injury to the plaintiff, resulting in whole or in part from such defect or insufficiency;

(3) That instruction number 5 correctly states the law under said act of Congress with respect to the extent to which the plaintiff's knowledge of the existence of the pile of cinders effects his right of recovery for the injury sustained by him, and resulting in whole or in part from the negligence of the officers, agents or employes of the defendant, or from any defect or insufficiency, due to its negligence, in its railroad track or roadbed; and

(4) That instruction number 6 correctly states the law with respect to the doctrine of contributory negligence as applicable to this case.

And thereupon the plaintiff tendered to the court this, his first bill of exceptions, and prayed that the same may be signed, sealed, enrolled and made a part of the record in this cause, which is accordingly done.

JESSE F. WEST, [SEAL.]
Judge of the Circuit Court of Brunswick County, Virginia.

141 VIRGINIA:

Circuit Court of Brunswick County.

RALPH B. JACOBS
v.
SOUTHERN RAILWAY COMPANY.

Bill of Exceptions No. 2.

Be it remembered that on the trial of this cause, after the plaintiff to sustain the issue on his part, and the defendant to sustain the issue on its part, had, respectively, introduced before the jury the evidence set forth in plaintiff's bill of exceptions No. 7, which is here referred to and made a part of this bill of exceptions as fully as if the said evidence were herein set forth at length, the defendant, by counsel, moved the court to give to the jury certain instructions marked A, B, C, D, E, F, G and H, in the following words to-wit:

"(A) The court instructs the jury that if they believe from the evidence that the existence of the cinder pile was known to the plaintiff, or that he had been working on the Southern Railway at Lawrenceville for more than a year, and that the cinders had been piled at the same place in the way described by the witnesses for many years prior to the accident, and that the plaintiff had failed to show that he had made complaint or objection on account of the cinder pile, then he assumed the risk of danger from the cinder pile, if there was any danger in it, and the act of Congress approved April 22, 1908, permits this defence, and the jury should find their verdict for the defendant.

"(B) The court instructs the jury that the gist of this action is negligence on the part of the defendant company, and the burden of proof is upon the plaintiff to show to the satisfaction of the jury by evidence that the defendant company in allowing the cinders to accumulate as shown by the evidence was doing something that was not done by reasonable and well managed railroad companies, under similar circumstances and conditions, and unless they are so satisfied from the evidence, they should find for the defendant.

142 "(C) The court instructs the jury that this action is brought under the act of Congress approved April 22, 1908, and the amendment thereto, and before the plaintiff can recover in this action he must show by the evidence that both the plaintiff and the defendant, at the time of the accident were engaged in interstate commerce.

"(D) The court instructs the jury that according to the undisputed evidence at the time the accident occurred, the train was engaged in switching cars, and the act of Congress under which this action is brought does not apply to switching movements.

"(E) The court instructs the jury that according to the undisputed evidence at the time of the accident the train was engaged in moving cars, Southern No. 136532 and N. Y. P. & N. No. 1352, which cars were consigned to Emporia and Franklin, Virginia, and both were set off at Emporia, Virginia, all points in Virginia, and there being no evidence that any of the contents of either of these cars originated outside of Virginia, or was destined to any point outside of Virginia, the act of Congress known as the Employers' Liability Act does not apply and the jury should find their verdict for the defendant.

"(F) The court further instructs the jury that if they believe from the evidence that the cinders piled along the said railroad track at the place of the injury were piled in a manner employed by all well managed railroads, and that they were piled in a reasonably safe manner and that such method was known to the plaintiff at the time of the injury complained of, and that the plaintiff in returning to his duty from his personal errand, attempted to mount his engine while standing upon the said pile of cinders, and in doing so fell under the train and received the injury complained of, they must find for the defendant.

"(G) The court instructs the jury that the gist of this action is negligence on the part of the defendant, and the burden of proof is

upon the plaintiff to show to the satisfaction of the jury by evidence that the defendant in allowing the cinders to accumulate
143 along the track was guilty of negligence.

"(H) The court further instructs the jury that if they believe from the evidence that the cinders piled along the said railroad track at the place of the injury were piled in a reasonably safe manner, and that such method was known to the plaintiff at the time of the injury complained of, and that the plaintiff in returning to his duty attempted to mount his engine while standing upon the said pile of cinders, and in doing so fell under the train and received the injury complained of, they must find for the defendant,"

to the giving of which several instructions, and each one thereof, the plaintiff, by counsel, objected, and the court gave to the jury instructions marked A. G. and H. respectively, and refused to give to the jury instructions marked B. C. D. E. and F. respectively, to which action and ruling of the court in giving to the jury the said instruction marked A, in the words and figures above set forth, the plaintiff, by counsel, then and there duly excepted, upon the following grounds:

(1) That the common law defence of assumption of the risk is not an available defence in bar of a recovery for any liability created and imposed by the first section of the act of Congress; and

(2) Upon the ground that said instruction marked A. does
144 not correctly state the common law doctrine of assumption of the risk.

And thereupon the plaintiff tendered to the court this, his second bill of exceptions, and prayed that the same may be signed, sealed, enrolled and made a part of the record in this cause, which is accordingly done.

JESSE F. WEST, [SEAL.]
Judge of the Circuit Court of Brunswick County, Virginia.

VIRGINIA:

Circuit Court of Brunswick County.

RALPH B. JACOBS
v.
SOUTHERN RAILWAY COMPANY.

Bill of Exceptions No. 3.

Be it remembered that on the trial of this cause, after the plaintiff to sustain the issue on his part, and the defendant to sustain the issue on its part, had, respectively, introduced before the jury the evidence set forth in plaintiff's bill of exceptions No. 7, which is here referred to and made a part of this bill of exceptions as fully as if the said evidence were herein fully set forth, and after the court had announced that it would give to the jury instructions numbered 1, 2, and 7, requested by the plaintiff, and set forth in plaintiff's bill

of exceptions number 1, and here referred to, the plaintiff,
145 by counsel, requested and moved the court to give to the jury his instruction number 3, in the following words:

"(3) If the jury believe from the evidence that the officers, agents and employes of the defendant, or any of them, negligently caused, suffered or permitted the pile of cinders mentioned in the declaration to be placed, and to be, remained and accumulate, upon and alongside the main line of its railroad track or roadbed upon its railroad yard at the town of Lawrenceville, in dangerous proximity to the said railroad track, and that the plaintiff suffered the injury mentioned in the declaration, and that such injury resulted in whole or in part fromthe negligence of the said officers, agents and employes of the said defendant, or any of them, in so negligently causing, suffering or permitting the said pile of cinders to be placed, and to be, remain and accumulate upon and alongside the said railroad track or roadbed as aforesaid, they should find for the plaintiff,"

to the giving of which instruction, the defendant objected, and the court sustained the said objection and declined to give the said instruction to the jury, to which action and ruling of the court in declining to give plaintiff's said instruction No. 3, the plaintiff, by counsel, then and there duly excepted, upon the following grounds, to-wit:

146 That instruction number 3 correctly states the law in so far as the first section of the act of Congress approved April 22, 1908, known as the Employers' Liability Act, makes the negligence of any of the officers, agents or employes of the defendant the basis of recovery for an injury to the plaintiff, resulting in whole or in part from such negligence;

And thereupon, the plaintiff tendered to the court this, his third bill of exceptions, and prayed that the same may be signed, sealed, enrolled and made a part of the record in this cause, which is accordingly done.

JESSE F. WEST, [SEAL.]
Judge of the Circuit Court of
Brunswick County, Virginia.

VIRGINIA:

Circuit Court of Brunswick County.

RALPH B. JACOBS
v.
SOUTHERN RAILWAY COMPANY.

Bill of Exceptions No. 4.

Be it remembered that on the trial of this cause, after the plaintiff to sustain the issue on his part, and the defendant to sustain the issue on its part, had, respectively introduced before the jury
147 the evidence set forth in plaintiff's bill of exceptions No. 7, which is here referred to and made a part of this bill of ex-

ceptions as fully as if the said evidence were herein fully set forth, and after the court had announced that it would give to the jury instructions No. 1, 2, and 7, requested by the plaintiff, set forth in plaintiff's bill of exceptions number 1 and here referred to, the plaintiff, by counsel, requested and moved the court to give the jury his instruction No. 4, in the following words:

"(4) If the jury believe from the evidence that the defendant, through its officers, agents and employes, or any of them, negligently caused, suffered or permitted the pile of cinders mentioned in the declaration, to be placed and to be, remain and accumulate upon and along-side the main line of its railroad track or road-bed upon its railroad yard at the town of Lawrenceville, in dangerous proximity to the said railroad track or roadbed, and that said pile of cinders constituted a defect or insufficiency in the said railroad track or roadbed of the said defendant, due to the negligence of the said defendant, and that the plaintiff suffered the injury mentioned in the declaration, and that such injury resulted in whole or in part from such defect or insufficiency in the said railroad track
148 or roadbed, due to the negligence of the said defendant as aforesaid, in so negligently causing, suffering or permitting the said pile of cinders to be placed and to be, remain and accumulate upon and alongside the said railroad track or roadbed as aforesaid, they should find for the plaintiff,"

to the giving of which instruction, the defendant objected, and the court sustained the said objection and declined to give the said instruction to the jury, to which action and ruling of the court in declining to give plaintiff's said instruction No. 4, the plaintiff, by counsel, then and there duly excepted, upon the following ground, to-wit:

That instruction number 4 correctly states the law in so far as the first section of the said act of Congress makes any defect or insufficiency in the railroad track or roadbed of the defendant, due to the negligence of the defendant, the basis of recovery for the injury to the plaintiff, resulting in whole or in part from such defect or insufficiency;

And thereupon, the plaintiff tendered to the court this, his fourth bill of exceptions, and prayed that the same may be signed, sealed, enrolled and made a part of the record in this cause, which is accordingly done.

JESSE F. WEST, [SEAL.]
Judge of the Circuit Court of
Brunswick County, Virginia.

149 VIRGINIA:

Circuit Court of Brunswick County.

RALPH B. JACOBS
v.
SOUTHERN RAILWAY COMPANY.

Bill of Exceptions No. 5.

Be it remembered that on the trial of this cause, after the plaintiff to sustain the issue on his part, and the defendant to sustain the issue on its part, had respectively, introduced before the jury the evidence set forth in plaintiff's bill of exceptions No. 7, which is here referred to and made a part of this bill of exceptions as fully as if the said evidence were herein fully set forth, and after the court had announced that it would give to the jury instructions numbered 1, 2 and 7, requested by the plaintiff, set forth in plaintiff's bill of exceptions No. 1, and here referred to, the plaintiff, by counsel, requested and moved the court to give to the jury his instruction No. 5 in the following words:

"(5) The fact that the plaintiff may have had knowledge of the existence of the pile of cinders mentioned in the declaration is not a bar to an action for injury caused to him thereby. Such knowledge, however, if the jury believe from the evidence that he had such knowledge, may be considered by the jury along with
150 all the evidence in the case in determining whether the plaintiff was himself guilty of negligence which contributed to produce the injury mentioned in the declaration; but the fact that the plaintiff may himself have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of contributory negligence, if such there were, which they may believe from the evidence was attributable to said plaintiff under the circumstances,"

to the giving of which instruction, the defendant objected, and the court sustained the said objection and declined to give the said instruction to the jury, to which action and ruling of the court in declining to give plaintiff's said instruction No. 5, the plaintiff, by counsel, then and there duly excepted, upon the following ground, to-wit:

That instruction number five correctly stated the law under said act of Congress with respect to the extent to which the plaintiff's knowledge of the existence of the pile of cinders affects his right of recovery for the injury sustained by him, and resulting in whole or in part from the negligence of the officers, agents or employes of the defendant, or from any defect or insufficiency, due to its negligence, in its railroad track or roadbed;

And thereupon, the plaintiff tendered to the court this
151 his fifth bill of exceptions, and prayed that the same may be signed, sealed, enrolled and made a part of the record in this cause, which is accordingly done.

JESSE F. WEST, [SEAL.]
Judge of the Circuit Court of
Brunswick County, Virginia.

VIRGINIA:

Circuit Court of Brunswick County.

RALPH B. JACOBS
v.
SOUTHERN RAILWAY COMPANY.

Bill of Exceptions No. 6.

Be it remembered that on the trial of this cause, after the plaintiff to sustain the issue on his part, and the defendant to sustain the issue on its part, had, respectively introduced before the jury the evidence set forth in plaintiff's bill of exceptions No. 7, which is here referred to and made a part of this bill of exceptions as fully as if the said evidence were herein fully set forth, and after the court had announced that it would give to the jury instructions numbered 1, 2 and 7, requested by the plaintiff, and set forth in plaintiff's bill of exceptions No. 1, which is here referred to, the plaintiff, by counsel, requested and moved the court to give
152 to the jury his instruction No. 6, in the following words:

"(6) In order to charge the plaintiff with contributory negligence, which the jury are to consider in mitigation of damages, the jury must believe from the evidence not only that the plaintiff knew of the existence of the pile of cinders, but also that the danger occasioned by said pile of cinders was known to him, or was so obvious that a man of ordinary prudence would have appreciated such danger, and not have attempted, as the plaintiff did, to get upon the engine at the time and under the circumstances disclosed by the evidence."

to the giving of which instruction, the defendant objected, and the court sustained the said objection and declined to give the said instruction to the jury, to which action and ruling of the court in declining to give plaintiff's said instruction No. 6, the plaintiff, by counsel, then and there duly excepted, upon the following ground, to-wit:

That instruction number 6 correctly states the law with respect to the doctrine of contributory negligence as applicable to this case.

And thereupon, the plaintiff tendered to the court this, his sixth bill of exceptions, and prayed that the same may be signed, sealed, enrolled and made a part of the record in this cause, which is accordingly done.

JESSE F. WEST, [SEAL.]
Judge of the Circuit Court of Brunswick County, Virginia.

153 VIRGINIA:

Circuit Court of Brunswick County.

RALPH B. JACOBS
v.
SOUTHERN RAILWAY COMPANY.

Bill of Exceptions No. 7.

Be it remembered that on the trial of this cause, the plaintiff and the defendant, respectively, introduced, to maintain the issues on their part, the following testimony:

In the Circuit Court of Brunswick County, Virginia.

R. B. JACOBS
v.
SOUTHERN RAILWAY COMPANY.

Testimony.

Before Honorable J. F. West and Jury.

LAWRENCEVILLE, VIRGINIA, September 3, 1914.

Present: Messrs. Buford, Lewis & Peterson for the plaintiff; Messrs. W. L. Williams and Turnbull & Turnbull for the defendant; D. S. Phlegar, Shorthand Reporter, Norfolk, Virginia.

E. W. LIGON, on behalf of the plaintiff, being duly sworn, testified as follows:

154 Examined by Mr. BUFORD:

Q. Mr. Ligon, what position do you hold?
A. Agent for the Southern Railway, at Lawrenceville.
Q. Agent for the Southern Railway Company at Lawrenceville?
A. Yes, sir.
Q. Tell the court and jury how the train, the freight train made up here on the morning of the 19th of August, 1911, is designated?
A. It is known as train 62.
Q. What is the run of that train?
A. From Lawrenceville to Pinners Point.
Q. What was that train composed of?

Mr. WILLIAMS: Now, may it please your Honor, I object unless he knows by independent memory, unless he has a memorandum made by himself from which he could give that information.

The COURT: I suppose that he has reference to whether freight train or passenger.

Mr. WILLIAMS: He said what composed it, and I suppose he meant the names and number of cars.

Mr. BUFORD: Yes.

Mr. WILLIAMS: This occurred on the 19th of August, 1911, a considerable length of time back. I say any witness can only testify by having independent recollection, or having some memorandum made at the time, by which he can refresh his memory.

The COURT: The position seems sound.

Mr. BUFORD: I assume that he is going to speak with reference to his records.

Mr. WILLIAMS: I then ask for the production of the record.

By Mr. BUFORD:

Q. Answer my question, Mr. Ligon, from records, if you have them.

A. (Witness examines the records.)

Mr. WILLIAMS: Will you permit me to ask him whether he made that record himself?

The COURT: Yes.

By Mr. WILLIAMS:

Q. Did you make that record yourself, Mr. Ligon?

A. No, sir.

Mr. WILLIAMS: I say that he cannot refresh his memory from it.

By the COURT:

Q. Who made the record, if you know?

A. The consist of the train was made by the operator on duty at that time, and checked by the conductor as to what particular cars he moved.

By Mr. BUFORD:

Q. By the operator—one of the agents of the company?

A. He was in the employ of the company.

Q. Is that the regular record of the Southern Railway Company?

A. Yes, sir.

Q. Is that what the Southern Railway Company, and all its officers, rely upon as showing what was the train on that date?

A. That is what we use at the office.

Q. Is the record produced from the office at Lawrenceville?

A. Yes, sir.

Q. That is a part of the record of your office, is it?

A. Yes, sir.

Q. Who was the man who actually made that record?

A. I could not tell now, Mr. Buford, unless I examine my time sheet to see who worked that day, as I do not recognize the handwriting.

Q. Have they been in the possession of the company, at Lawrenceville, all this time?

A. Yes, sir.

Q. Will they be returned by you to the company, and be kept as a part of the records of the office here?

157 A. Yes, sir.

Q. Are they under your control, as agent of the company?

A. Yes, sir.

Q. You say the conductor in charge of the train checked that list, and his check shows what cars actually went into his train?

A. Yes, sir.

Q. Who was that conductor?

A. Conductor Renfrow.

Q. Is Mr. Renfrow's signature on there?

A. No, sir.

By Mr. BUFORD: We will call Mr. Renfrow to the stand just now to identify the record.

R. G. RENFROW, on behalf of the plaintiff, being duly sworn, testified as follows:

Examined by Mr. BUFORD:

Q. Mr. Renfrow, will you look at that list, please, sir, and say whether—are you the conductor of train No. 62?

A. Yes, sir.

Q. Were you the conductor on the 19th day of August, 1911?

A. Yes, sir.

158 Q. The morning on which Mr. Jacobs received his injury?

A. Yes, sir.

Q. Did you check that list of cars?

A. Yes, sir.

Q. Are those the cars that composed the train?

A. Yes, sir.

Q. And the train on which Mr. Jacobs was serving as fireman?

A. Yes, sir.

Q. What cars then composed the train?

A. Those that have my cross mark in this line down here.

Q. Will you please read them out, and give the name and number?

A. Southern 10753; A. C. L. 29093; N. Y. P. & N. 1352; Southern 133479; Southern 30790; Southern 11956; Southern 136532.

E. W. LIGON, takes the stand for further examination.

By Mr. BUFORD:

Q. Will you tell the jury now, Mr. Ligon, by reference to your records, how those cars, just mentioned by Mr. Renfrow, came to Lawrenceville, and when they were brought here?

Mr. WILLIAMS: Now, may it please your Honor, I desire to object to any inquiry or reference to cars before they came to Law-

159 renceville. The point I desire to make is this: The Act under which they are suing says that both the plaintiff and defendant must, at the time of the accident, have been engaged in

interstate commerce. Now, I take it that as far as they can go back into the history of the movement of this train, to undertake to bring this particular action under the Act of Congress, is making up of the train here in Lawrenceville. If there was any engaging in interstate commerce, it was at the time they began to make up the train here at Lawrenceville, to take it somewhere else. If you are going to depart from that rule, how far back are you going in tracing the movement of these cars: Are you going to Danville? If you are going to Danville, why can't you go to Greensboro, or any other place from which they may have started, one or two weeks previous? In my judgment the inquiry should be confined not to when the cars arrived at Lawrenceville (that is immaterial), but what was done with them when they started away from Lawrenceville.

Mr. BUFORD: If your Honor please, I think my friend, Mr. Williams, takes rather too narrow a view.

Mr. WILLIAMS: Possibly so. We are working on new ground, this is the first case I have tried under this law, and I do not
160 pretend to know all about it.

Mr. BUFORD: My friend is extremely frank, if your Honor please, he admits that his ground is too narrow.

The COURT: The objection is overruled.

Mr. WILLIAMS: I take an exception.

By Mr. BUFORD:

Q. Now, answer the question, please, how did these cars come to Lawrenceville—when were they brought here, and by what train?

A. I think all of them but one were brought in by train No. 64 the day before.

Q. Which was it that was not brought in by train 64?

By Mr. WILLIAMS (interposing): Do you know it of your own knowledge, or on any record made of your own?

A. I have no record of my own, but from the record of the office.

Mr. WILLIAMS: I am compelled to renew my objection. They are attempting to show where these cars came from on 64. This witness has no independent recollection, and the only way you can do would be to have the witness who made the original record. That is my point. Here is a record which is proven to be a record of the company, relied on by the company, and used by the company.

That is all true, but the rule of law is that you must call the
161 man who made the original record. It is a good rule of law, and why? If there was any fraud about it, he is the only man you have the right to cross examine, and see if there was fraud.

Mr. BUFORD: What I would like to ask Mr. Ligon is this:

(Mr. BUFORD:)

Q. Is the man working at the office now who made that record?

A. No, sir.

Q. Where is he?

A. As I said a while ago, I don't know. I don't recognize his handwriting, and the only way I can tell is to examine further records at the office.

Q. Further records at the office?
A. Yes, sir.
Q. Well, I wish you would examine the further records during the recess. Without pressing that question right now, I am going to ask you did — mention train 64?

By the COURT: Yes.

By Mr. BUFORD:

Q. You mentioned that?
A. Yes, sir.
Q. Tell the jury what train 64 is?
162 A. Train 64 is what is known as a local from the west, running from Danville to Lawrenceville.
Q. A local freight train running from Danville to Lawrenceville?
A. Yes, sir.
Q. At what time, before the accident, did this local freight train, known as No. 64, come to Lawrenceville from Danville?
A. Sometime in the afternoon of the 18th—the day before.
Q. Of August 18th?
A. Yes, sir.
Q. What is the practice of the company with reference to the freight cars that are brought to Lawrenceville by train No. 64?

Mr. WILLIAMS: Now, may it please your Honor, I desire to renew the objection to that question. That is entering into an investigation not as to No. 62, on which this plaintiff got hurt, but on No. 64. I take it, your Honor will rule in the same way you have done, but I do not desire to appear to omit the objection.
The COURT: I understand you want to know what became of the cars on 64?
Mr. BUFORD: Yes, whether they were taken further.
NOTE.—The objection is overruled, and an exception is
163 noted by counsel for the defendant.

By Mr. BUFORD:

Q. What is the practice of the company, Mr. Ligon—what was the practice, at the time of the accident, with reference to the freight cars that were brought from Danville to Lawrenceville, or from Danville and points between Danville and Lawrenceville to Lawrenceville, on the evening of August 18th? How were they carried east?
A. They were switch listed to the eastbound trains.
Q. Which train?
A. Solids to the through trains and others to local trains.
Q. What is the number of the local train?
A. 62.
Q. So then a part of the cars that are brought into Lawrenceville from the Danville division, by means of train 64, are, according to the practice of the company, put into train No. 62 which goes from Lawrenceville east of Pinners Point?
A. That is correct.

Q. And now you say the cars you have mentioned were put into train 62 under those circumstances?
A. Yes, sir.

164 By Mr. BUFORD: I believe that we have no other questions for Mr. Ligon, if you will look up the records that we were talking about.
(No cross examination.)

J. C. RICE, on behalf of the plaintiff, being duly sworn, testified as follows:

Examined by Mr. BUFORD:

Q. Mr. Rice, what position do you hold?
A. As agent of the Southern Railway Company, at Jeffress, Virginia.
Q. Have you records of your office at Jeffress, Virginia, with you?
A. Yes, sir. Do you want me to get them?
Q. Yes.
A. (Witness produces same.)
Q. Mr. Rice, by whom were those records kept?
A. A part kept by myself and a part kept by my wife, who was clerk at the time.
Q. Will you examine these records, please, sir, and tell us whether they show that any cars mentioned by Mr. E. W. Ligon, the agent at Lawrenceville, as composing train 62, were a part of train 64 when they passed Jeffress station on the 18th of August, 1911?

Mr. WILLIAMS: May it please your Honor, I object. Jeffress
165 is west of Lawrenceville. Here is an inquiry as to what was done on the day previous to this accident at a point west of Lawrenceville. I submit that that is not material to this inquiry.
The COURT: It is a junction point, as I understand, where the road enters North Carolina.
Mr. PETERSON: The object of this testimony is simply this: Our object is, according to the bill of particulars that we have filed, to ascertain the character of the occupation of this railroad at the time of the accident to the plaintiff, and the fact that at the time the accident was sustained he was employed by the railroad engaged in interstate commerce. To do that we want to show what the function of this train 62, when it arrived at Lawrenceville, was, and so far as shipments were concerned it is a continuation of that train 64. We want to show that the train was engaged in interstate commerce not only by reason of the function of taking on any freight between here and Pinners Point, if offered, whether in or out of the State of Virginia, but also that it had in its possession merchandise in transit from North Carolina, from Drakes Branch, Chase City en route to Philadelphia and New York; that it was in continuous transit from one train to another.
166 The COURT: Objection over-ruled.
Mr. WILLIAMS: I take an exception.

By Mr. BUFORD:

Q. Will you please answer the question?

NOTE.—The question is read as follows: "Will you examine those records, please, sir, and tell us whether they show that any cars mentioned by Mr. E. W. Ligon, the agent at Lawrenceville, as composing train 62, were a part of train 64 when they passed Jeffress station on the 18th of August, 1911?"

A. You have the list Mr. Ligon mentioned?

Q. Yes. I will read the list. He said train 62 was composed of Southern car 10753.

A. I have no record of that.

Q. A. C. L. No. 29093.

A. No record.

Q. N. Y. P. & N. Car 1352.

A. No record.

Q. Southern car 133,479.

A. No record of that.

Q. Southern car No. 30790.

167 A. I have a record of that. Just a moment. (Witness refers to records:) Yes, I have a record of that, August 18th, 1911.

Q. 30790?

A. Yes, 30790.

Q. What shipments did that car contain, Mr. Rice?

A. That was a car in 64 when it reached my place, and we loaded into that car three shipments from Oxford, North Carolina, one destined to Union Level, Virginia, two of which were destined to Emporia, Va.; one shipment from Drakes Branch to New York, and another shipment from Chase City to Philadelphia.

Q. What were those shipments?

A. My records do not show, but Mr. Campbell, another witness, handled the original waybill. We kept the number of the car and waybill, but not the original article.

Q. So your records show that Southern car No. 30790 contained a shipment from Oxford, N. C., to Union Level, Virginia?

A. Yes, sir.

Q. It also contained a shipment from Oxford, N. C., to Emporia, Virginia?

A. Two shipments.

168 Q. It also contained shipment from Drakes Branch to the City of New York?

A. Yes, sir.

Q. It also contained a shipment from Chase City, Virginia, to the City of Philadelphia, in the State of Pennsylvania?

A. Yes, sir.

Q. You have no record of 11956? My impression is that that was taken up after the train passed your place?

A. No record of it.

Q. And no record of 136,532 Southern?

A. No.

Q. They were not composed in train 64 when they passed your palce?

A. No record of it if it contained it.

Q. It contained no shipment?

A. I only loaded into one car on that train.

Q. Now, Mr. Rice, where is Jeffress Junction?

A. Jeffress Junction is 46 miles west of Lawrenceville.

Q. Is it on the line between Danville and Lawrenceville?

A. Yes, sir.

Q. What state?

169 A. In Virginia.

Q. In Virginia?

A. Yes, sir.

Q. What junction—what other road is there?

A. The Keysville and Durham branch of the Southern Railway.

Q. The Keysville and Durham plies between Richmond, Virginia, and Durham, North Carolina?

A. Yes, sir.

Q. Is the town or city of Oxford, North Carolina, on the Keysville & Durham division?

A. Yes, sir, 26 miles south of Jeffress.

Q. The state line passes a little south of Jeffress?

A. Yes, sir.

Q. Is it, or not, a fact that freight cars coming from that division of the Southern, coming from North Carolina and points south, are transferred to the Atlantic and Danville division, to the Norfolk and Danville division, we call it now, and hauled through Jeffress to Lawrenceville, and from there to Norfolk?

A. Yes, sir, we transfer both carload and less than carload shipments at that place.

Q. So it is engaged in that kind of commerce between the

170 two States?

A. Yes, sir.

Q. I believe the court takes judicial notice of the geography of the state, but please state to the jury whether or not Lawrenceville is between Emporia and Jeffress Junction?

A. Yes, sir, Lawrenceville is 46 miles east of Jeffress, and Emporia is 67 miles east; it is east of Lawrenceville. It is 46 miles to Lawrenceville and 67 to Emporia, making Emporia east of Lawrenceville.

Q. Will you tell the court and jury whether the Atlantic and Danville division——

A. (Interposing.) The Norfolk Division of the Southern Railway is the term.

Q. The term "Norfolk Division" embraces the road between Danville and Norfolk?

A. Yes, sir.

By the COURT:

Q. Does it embrace anything else?

A. A branch line from Emporia to Claremont, and also, I think,

a part of the division consists of business handled over the Selma division over the Coast Line.

171 By the COURT:

Q. The Norfolk division don't mean this line, then, exactly?
A. The Norfolk and Danville instead of the Atlantic and Danville.

By Mr. BUFORD: We call it now, for the purpose of this case, the Norfolk and Danville division. Does that division lie wholly in the State of Virginia?

A. No.
Q. What state does it traverse?
A. North Carolina and Virginia.
Q. So that between Norfolk and Danville this road runs partly in North Carolina and partly in Virginia?
A. Yes, sir.
Q. Well, now, would passengers and freight passing over this line from Danville to Norfolk necessarily pass through the states both of Virginia and North Carolina?
A. Yes, sir.

(No cross-examination.)

C. L. CANDLER, on behalf of the plaintiff, being duly sworn, testified as follows:

172 Examined by BUFORD:

Q. Mr. Candler, what is your position—what position do you hold, if any, with the Southern Railway Company?
A. General Agent Norfolk and Pinners Point terminals.
Q. Have you any records, Mr. Candler, showing what cars composed train No. 62, which, I understand, is the freight train made up at Lawrenceville, and runs from Lawrenceville to Pinners Point, on the 19th day of August, 1911?
A. I have a record of what that train is said to have been composed of. I did not make the record myself.
Q. Who made the record?
A. One of the clerks connected with the Pinners Point office. I do not remember which one.
Q. Is that one of the records of the office?
A. Yes, sir.
Q. One of the official records of the Southern Railroad Company?
A. Yes, sir.
Q. What does that record show?

Mr. WILLIAMS: I object, may it please your Honor. He must have some independent recollection of it himself, or he must speak from a record made at the time. It is not claimed that he
173 has any independent recollection, or any knowledge of it. He has testified that he did not make that record.

The COURT: Objection sustained.

By Mr. BUFORD:

Q. Where is that clerk, Mr. Candler?
A. I don't know the individual, or the name.

R. G. RENFROW, recalled for further examination on behalf of the plaintiff, testified as follows:

Examined by Mr. BUFORD:

Q. Mr. Renfrow, you stated awhile ago that Southern car No. 30790 was one of the cars in the train which you took from here to Norfolk?
A. Yes, sir.
Q. Mr. Rice has testified that that car contained some shipments that were destined for New York and Philadelphia. You did not unload those shipments at any intermediate stations between here and Norfolk, did you?
A. Not that I know of.
Q. In the natural course of transit, they would have been unloaded where?
A. At Pinners Point.
174 Q. And that is the Norfolk terminal?
A. Yes.
Q. Just on this side of the Elizabeth River?
A. Yes, sir.

A. B. GRIGGS, on behalf of the plaintiff, being duly sworn, testified as follows:

Examined by Mr. BUFORD:

Q. Mr. Griggs, what is your position?
A. Agent of the Southern Railway Company at Danville.
Q. Were you agent for the Southern on the 18th and 19th of August, 1911?
A. Yes, sir.
Q. At Danville, Virginia.
A. Yes, sir.
Q. Do your records show that N. Y. P. & N. car No. 1352 was a part of freight train No. 64 that came from Danville to Lawrenceville on the evening of the 18th of August, 1911?

Mr. WILLIAMS: I make the same objection; unless the witness knows of his independent memory, or of a record made at the time, he is an incompetent witness.

The COURT: I think that position is correct.
175 Mr. BUFORD: We note an exception as to this witness, and as to the other two.

Mr. PETERSON: We want to except for this reason: We are putting the witness on, necessarily, as an employee of the defendant company. All this information is information which we elicit from the company's own records. It is a case entirely contradistinguished from a case where a person produces his own books, which are in the

nature of self-serving declarations. They are the official records of the Company, and whether true or false the company can only say. They are recognized among the company's official archives, and the burden shifts to the company to show that they are incorrect.

Mr. BUFORD: We want to state what we expect to prove. What we expect to prove by this witness is that the train we have just mentioned——

Mr. WILLIAMS: To state what you expect to prove, if the objection is to the evidence, it is proper, but here the objection is to the competency of the witness.

Mr. BUFORD: As I understand the rule of the Court of Appeals, it is when we offer a witness, the bill of exceptions should state what we expect to prove by the witness. What we want to prove, I started to say, was that N. Y. P. & N. car 1352 was a part of
176 train 64 that came from Danville to Lawrenceville on the evening of August 18th, 1911, and that this same car was put in train 62, the one from which the plaintiff received his injury, and that it contained a shipment of merchandise from Spencer, North Carolina, for delivery to intermediate stations between Danville and Norfolk. That is the fact which we want to prove.

The COURT: What was his answer—that he did not keep the record?

Mr. WILLIAMS: He has never answered.

By Mr. BUFORD:

Q. Did you, in fact, keep the records yourself?

A. No, sir.

Q. Who kept them?

A. It was kept in the yardmaster's office, but I could not say by whom.

Mr. PETERSON: You see we could never in the world find out.

By Mr. BUFORD:

Q. That is one of the official records kept for the Southern Railroad Company, is it not?

A. Yes, sir.

Q. It is regarded by the Railroad Company and its officers as being an official and authentic record, is it?

A. Yes, sir.

177 Q. In all the business dealings of the company, where it has any occasion to refer to this particular record, this would be treated by it as importing the truth, wouldn't it?

A. Yes, sir.

Q. When you take it from this court room, you will take it and restore it to its place as a part of the files of the Company?

A. Yes, sir.

The COURT: I sustain the objection for the present. I reserve the right to consider the matter further before the trial closes.

Mr. BUFORD: We reserve the exception. The same explanation

we make as to the other witness, except we want to show by Mr. Candler that Southern car 133479 had two bags of peanuts shipped from Franklin, Virginia, to Hillsboro, N. C.; two buggies shipped from Franklin, Virginia, to Kershaw, N. C.; one crate of wheels from Franklin, Virginia, to Johnson, North Carolina; that Southern car 30790 contained a box of clothing shipped from Drakes Branch to New York City and contained four tiers of tobacco shipped from Chase City, Virginia, to Philadelphia, Pennsylvania. I will state to the court that those are the two shipments Mr. Rice testified
178 to. I think Mr. Rice's testimony covers the point, but we want to supplement his testimony by Mr. Candler.

By the COURT:

Q. What is that paper you have in your hand?

A. A record of the cars composing train 64 out of Danville on August 18th, 1911, which was made by the yardmaster's office.

(No cross-examination.)

J. S. BERGMAN, on behalf of the plaintiff, being duly sworn, testified as follows:

Examined by Mr. BUFORD:

Q. Mr. Bergman, what is your position, or what was your position on the 19th day of August, 1911?

A. Superintendent of the Norfolk division Southern Railway.

Q. Does that embrace the division between Danville and Norfolk?

A. Yes, sir.

Q. Tell the jury what were the functions and duties of train 62 which left Lawrenceville on the morning of August 19th, 1911, for Pinners Point?

A. Train 62 is a local freight train made up at Lawrenceville, running between Lawrenceville and Pinners Point, to do the
179 local work, load or unload freight, do the necessary switching at all stations, picking up and setting off cars.

Q. Does train No. 62 start at Lawrenceville?

A. Yes, sir.

Q. Train No. 64 comes in from the Danville end?

A. Yes, sir.

Q. Train No. 64 does not go further than Lawrenceville?

A. No, sir.

Q. Then, as I understand you, 62 is made up of trains that come from the Danville end?

A. 62 is made up partly of trains coming from the Danville end, or it might be cars originating at Lawrenceville.

Q. In other words, train 62 is made up of cars originating at Lawrenceville, or cars brought to Lawrenceville from the western end?

A. Yes, sir.

By the COURT:

Q. Is, or not, train 62 a continuation of train 64, so far as any cars are concerned which come from the west?

A. Not necessarily, Judge.
Q. I mean cars carrying local freight—not full cars?
A. In some instances, yes; in some instances cars coming
180 in on 64 go through on 62.

By Mr. BUFORD:

Q. When does train 64 leave Danville?
A. It leaves Danville at 6:15 in the morning.
Q. When does it arrive at Lawrenceville?
A. I think 3:45 or four o'clock, or something about that time; I don't know exactly.
Q. In the afternoon?
A. Yes, sir.
Q. Then, when does 62 leave Lawrenceville for Norfolk?
A. It ought to leave at six A. M.
Q. When does it arrive at Norfolk or Pinners Point?
A. 3:30.
Q. P. M.?
A. Yes, sir.
Q. Any shipments destined from any stations along the line between Danville and Norfolk, for points outside of the State of Virginia, would, according to the functions of train 64 and train 62, be put on those trains, wouldn't they?
A. Local shipments.
Q. Local shipments or interstate commerce?
A. Yes, sir.
181 Q. Why are they called local trains, as distinguished from through trains?
A. Because they principally do local work.
Q. They stop at all the stations, I understand?
A. If there is any work.
Q. To be done at the stations?
A. Yes, sir.
Q. The through trains do not stop at all the stations, do they?
A. Not unless they have something to set off or to pick up.
Q. And that would be a solid car?
A. Generally, yes, sir.
Q. The Norfolk and Danville division connect at Danville with the main line of the Southern which runs from Washington all the way down through the southern states?
A. Yes, they connect there.
Q. And what connection has it at Norfolk with points outside of the state?
A. Well, they connect with the various boat lines there, or other railroads.
Q. Connect with the boats plying between New York,
182 Baltimore, Philadelphia and Washington?
A. Yes, sir.
Q. And other railroads engaged in interstate commerce?
A. Yes.

Cross-examination.

By Mr. WILLIAMS:

Q. Mr. Bergman, are there any other freight trains out of Lawrenceville going east except 62?
A. Yes, sir.
Q. What are they?
A. We have a through train out of here known as 88.
Q. 88?
A. Yes, sir.
Q. Any other?
A. That is all.

By the COURT:

Q. That is a through freight, you say, is it?
A. Yes, sir, considered through freight.

By Mr. WILLIAMS:

Q. What time is that due to leave Lawrenceville?
A. Eight P. M.
Q. If there are cars in the yard at Lawrenceville ready to
183 go east, to Pinners Point, does 88 carry them?
A. Yes, sir, most always.

F. J. OLIVER, on behalf of the plaintiff, being duly sworn, testified as follows:

Examined by Mr. BUFORD:

Q. Mr. Oliver, what position did you hold on the 18th and 19th of August, 1911?
A. Agent for the Southern, at Suffolk.
Q. At Suffolk, Virginia?
A. Yes, sir.
Q. Can you tell the court and jury, of your own personal knowledge, whether any interstate shipments were made on train No. 62 on the 19th day of August, 1911?
A. I cannot.

Mr. WILLIAMS: May it please your Honor, I object to this line of examination. This was long after the accident. That was way down yonder in Suffolk, and it must have been hours after the accident. The question is whether the plaintiff and defendant were engaged in interstate commerce at Lawrenceville at the time of the
accident, and how can they do that by inquiring whether
184 they had it in Suffolk long afterwards?
The COURT: I think that is permissible. I think it tends to show whether they were engaged in interstate commerce.
Mr. WILLIAMS: I except.

J. H. EGGLESTON, on behalf of the plaintiff, being duly sworn, testified as follows:

Examined by Mr. BUFORD:

Q. Mr. Eggleston, were you a member of the train crew of train 62 on the morning of the 19th of August, 1911?
A. Yes, sir.
Q. That is to say train 62 of the Southern Railroad Company, which started from Lawrenceville to Pinners Point on that day?
A. Yes, sir.
Q. What position did you hold, Mr. Eggleston?
A. Brakeman.
Q. You were brakeman on that train?
A. Yes, sir.
Q. Who composed the train crew?
A. Captain Renfrow, Clift Williams and E. H. Pulliam and myself were the train crew.
185 Q. Who was the fireman?
A. Mr. Jacobs.
Q. Mr. Ralph B. Jacobs, the plaintiff?
A. Yes, sir.
Q. Is not it the phraseology of the railroad people that a fireman is a member of the train crew?
A. Yes, sir.
Q. He was also a member of the train crew?
A. Yes, sir.
Q. He was an employee of the Southern Railroad Company, as fireman on this train?
A. Yes, sir.
Q. Did you see the accident which resulted in the loss of his leg?
A. Yes, sir.
Q. Please tell the jury how it occurred?
A. As near as I can. I was on top of the cars as they were being pulled out of the siding, and I saw Mr. Jacobs as he came out to get on the engine. It seemed, the best I could see, from the distance I was, that he aimed to set his cooler of water on the deck of the engine. As to whether he ever set it up there, I am not able to say
186 positively. I saw him, and he seemed to have fallen, or missed his hold, or something, and fell, and the journal box on the tank struck him, and rolled him over, and I do not think he got under the train entirely until after the tank of the engine had passed him. Then he rolled down underneath the front car, and the best I could see of him the box knocked him, and rolled him until I think possibly one or two of the cars had passed him before his leg was cut off.
Q. His leg was cut off, was it?
A. Yes, sir.
Q. Where did that accident occur, Mr. Eggleston?
A. Right above the passenger station.
Q. In the yard here at Lawrenceville?
A. Yes, sir.

Q. When you say above, you mean east of the passenger station?
A. Yes, sir.
By the COURT: Do you mean east or west.
By Mr. BUFORD: East.
By the COURT: He said "down".
By Mr. BUFORD: It is either up or down. The general tendency is down.
A. I could not say how far it was from the station. It was not very far.

187 (Mr. BUFORD:)

Q. Comparatively a few yards?
A. Yes, sir.
Q. Mr. Eggleston, that was on the 19th of August, 1911?
A. Yes, sir.
Q. I asked, I believe, if that was not train 62?
A. Yes, sir.
Q. Now, what caused Mr. Jacobs to fall, so far as you can tell the jury?
A. Well, I really could not say exactly what caused him to fall. He must have lost control of his feet, by aiming to set his cooler up on the deck of the engine, and those cinders under him there probably——
Q. Coming in contact with the cinders?
A. Coming in contact with them might have had something to do with it.
Q. What kind of cinders were they—what were the cinders?
A. Cinders where the passenger trains cleaned their fires there—No. 2 and No. 4; I think that is all that cleaned their fires there.
Q. Where do the other engines clean their cinders?
A. No. 1 and No. 3 I think clean theirs on the west side of the depot.

Q. What sort of pile of cinders was it?
188 A. Cinders that came out of the firebox.
Q. How high were they?
A. I reckon probably 18 or 20 inches high.
Q. All loose cinders?
A. Well, yes, they were practically loose. They had been packed down some by walking over them.
Q. For what length of distance did they extend up and down the railroad track?
A. I really could not say the exact distance. I never took any measurement of it, but I suppose something like 30 feet.
Q. How wide were they from the rail up—as I understand it, it was on the north side of the track?
A. Yes, sir.
Q. How wide were they from the northern rail up this way?
A. I reckon to the best of my judgment, probably five or six feet; may be seven feet.
Q. So, then, here was a pile of cinders five or six or seven feet wide, about 30 feet long, lying alongside of the rail, and about 18 or 20 inches deep?

A. Yes, to the best of my judgment.
Q. That he came in contact with?
A. Yes, sir.
189 Q. He stumbled there and fell under the train?

Mr. WILLIAMS: I don't know that he said that.

By Mr. BUFORD:

Q. What did you say?
A. I say when he set his cooler of water—or, his intentions were, the best I could see, to set his cooler of water on the deck of the engine, he come in contact with something that caused him to fall. I could not say definitely that the cinders threw him, or how it occurred.
Q. Do you know whether he set the cooler down on the deck of the engine, or not?
A. I thought that he did, but I was some little distance from him. I could not say positively that I know that he did set it down.
Q. What was your position?
A. I was on top of the train getting the brakes off the cars as they were being pulled out of the yard.
Q. How long had the cinders been there, do you know?
A. Well, I could not say positively, Mr. Buford. They accumulate there from time to time. Sometimes they stay there longer than others. It just depends on the amount of them that has got out there.
Q. Had the train been completely made up at the time of the accident?
190 A. I don't think it had. I do not think we had quite finished making the train up. In fact, I am positive that we had not. I think we made a switch or two may be after the accident.
Q. What time of day was the accident?
A. It was something between six and seven o'clock, I think, or between five and six. Captain Renfrow can tell you better than I can about that. I don't remember exactly what time the accident occurred.

Cross-examination.

By Mr. WILLIAMS:

Q. Mr. Eggleston, you were asked just now about what time, and you said you could not remember the exact time; was it sunset?
A. It was getting light; I think the sun was up.
Q. Now, Mr. Eggleston, how long had you been working here as brakeman on the Southern Railway?
A. Well, off and on since 1903, I believe.
Q. Now, tell the jury during all that period if these cinders had been piled up there off and on as they were when the accident occurred?
A. Yes, sir, off and on ever since I have been there those cinders have been accumulating there.

Q. You say that is ever since 1903?

A. I think so.

191 Q. Do you know how long Mr. Jacobs has been working here on this yard as fireman?

A. I could not say I know exactly how long he has been here.

Q. You can't tell exactly, but give an impression?

A. Somewhere near two years, I reckon.

Q. Now, Mr. Eggleston, how close to the middle of that cinder pile was Mr. Jacobs when he fell?

A. Well, I could not say the exact spot. It appeared to me to be somewhere near the middle of it, somewhere near the middle of the cinder pile.

Q. You have known Mr. Jacobs a good long time, hav-n't you?

A. I have only known him since he came to Lawrenceville.

Q. You think it has been about two years?

A. It has been over two years now. I do not know how long he had been here when the accident occurred.

Q. Do you know about how long he had been working here before this accident occurred?

A. No, sir. That is what I told you a minute ago, I don't know exactly how long he had been here when the accident occurred. I have known him over two years. I knew him when he came here and up until now.

192 Q. Now, Mr. Eggleston, with reference to the well—there is a well up to the northward?

A. Yes, sir.

Q. With reference to that well and the track, was Mr. Jacobs in line with the well as you go straight from the well to the track?

A. I thought he was when I saw him, but I have learned since that I was mistaken in the place that he got his water.

Q. When you first saw him, what was he doing?

A. Going to the engine, and I was confident that he got his water from Mr.——

Q. In going to the engine, when you first saw him, did he have to cross the cinder pile to get to the engine?

A. Yes, sir.

By the COURT:

Q. Where did he get the water from?

A. Well, he told me, I think——

Mr. WILLIAMS: It is contrary to the law to tell what he said. He is going on the stand, and can testify to that.

WITNESS: I can't say I know where he got the water.

193 R. B. JACOBS, the plaintiff, being duly sworn, testified as follows:

Examined by Mr. BUFORD:

Q. Mr. Jacobs, are you the plaintiff in this case?

A. Yes, sir.

Q. What position did you hold, Mr. Jacobs, on the 19th day of August, 1911?

A. Fireman.

Q. Did you receive the injuries that are described in the declaration in this case?

A. Yes, sir.

Q. Tell the jury all the facts and circumstances under which you received that injury?

A. Well, to begin with I was called at five o'clock. I got down to the roundhouse, and changed clothes, and got my overalls on, and went on and got on the engine, and got the engine ready to leave the yard. We left the shop yard at six o'clock, and pulled up on the main line, and pulled up to the tank and got water. Then we pulled up above the depot, and I got my fire ready.

Q. You got water for the engine?

A. Yes, sir, to use in the boiler.

Q. That was to use in the engine?

194 A. Yes, sir.

Q. Not the water you got afterwards before the injury?

A. No, sir. We commenced switching, and I took the water cooler and got off of the engine up at the depot, and started to the house to get water. I went up the hill to Mrs. Moody's, the place I boarded and intended to get my breakfast and dinner at the same time. Then I come on back across the bridge, and come down by Captain Moody's—in front of Captain Moody's—not Moody's, but Harrison's—and come down the railroad—I don't know what street it is, and come across the track on the crossing. At the time the train was pulling out of the last track. So I waited until the train was pulling up there, and aimed to catch it, and when I aimed to catch it I made three or four steps to get on it, you know, and I got to the cinder pile before I knew it, and I tripped, and went under the engine.

Q. What tripped you?

A. The cinder pile.

Q. Did you eat breakfast at your boarding house that morning?

A. No, sir.

Q. You said you went there to get your breakfast and dinner both?

A. Yes, sir, in a bucket.

Q. Did you get it?

195 A. No, sir.

Q. You did not get your food?

A. No, sir, I didn't get anything but water.

Q. You got a cooler of water?

A. Yes, sir.

Q. What sort of cooler was it?

A. I suppose the cooler was about that long (indicating), and about that large around (indicating), with a handle to it, made like a bucket.

Q. A tin cooler?

A. Yes, sir.

Q. It would hold about how much water?
A. Not over a gallon.
Q. Where were you getting that cooler of water from?
A. At Mrs. Moody's.
Q. Why?
A. For drinking purposes.
Q. For who?
A. Myself and the engineer.
Q. In the cab?
A. Yes, sir.
Q. Did the railroad company supply you with drinking water on the run?
196 A. No, sir, we had to get it ourselves.
Q. How long had that been the practise of the company to supply yourselves with water that way?
A. Ever since I have been on the road.
Q. So it was a part of the practise of the road for you and the engineer to supply yourselves with a can of water to drink on the trip from here to Norfolk?
A. Yes, sir.
Q. Where was your boarding house?
A. Mrs. Moody's.
Q. That is just this side of the overhead bridge?
A. Yes, sir, right at the corner of Captain Moody's store.
Q. Then, as I understand you to say, you went over the overhead bridge?
A. Yes, sir, back the back gate, and over the overhead bridge, and to the station.
Q. And crossed there?
A. Yes, sir.
Q. And saw the train coming along?
A. Pulling out of the sidetrack by the depot—not by the side of the depot, but at the west end.
197 Q. Coming along the track to the east end of the depot?
A. Yes, sir.
Q. And you stood there, and I understood you to say undertook to get on the engine as it came along?

Mr. WILLIAMS: I have no objection, but I must object to that line of examination as distinctly leading.
The COURT: I think it was leading. The objection is sustained.

By Mr. BUFORD:

Q. Then you got across the railroad?
A. Yes, sir, and I got across the railroad track before the train got to the depot. It was about the west end of the depot.
Q. Then, on which side of the track were you on—the north or south side?
A. The north side. I come down on the south side and crossed over.

By the COURT:

Q. I thought when he got back there that he was on that side?
A. No, sir. I can catch a train better on the left side.

By Mr. BUFORD:

Q. Had the train started out?
A. No, sir.

198 By the COURT:

Q. Was it on the side track or main line?
A. It was pulling on the main line. It was just about on the main line at the time I was hurt.

By Mr. BUFORD:

Q. How fast was the train moving, do you know?
A. Just about as fast as anybody could walk, that is pretty peart walking; not over three or four miles and hour at the most.
Q. State whether or not it was customary for the train men to get on and off the engine when it was going that way?

Mr. WILLIAMS: I object to that, may it please your Honor; unless it is shown that the officers of the company knew and acquiesced in it, it would not be competent.

By Mr. BUFORD: I was going to follow it up.

Q. State whether or not that was done with the knowledge of the officers?
A. It has been customary ever since I have been on the road, and they all know it, and I have seen it done hundreds of times a day, I reckon.
Q. Was there any rule of the company forbidding your getting on a train moving that way?
199 A. I never saw any.
Q. Did they ever furnish you a rule book?
A. No, sir.
Q. All during your service you were never furnished with a rule book?
A. No, sir.
Q. Were you ever instructed not to?
A. No, sir.
Q. When you started to get on the engine, how far were you from the edge of this pile of cinders?
A. I was about the further side of the crossing, and the cinder pile commenced on the east end of the crossing. I was about the distance from here to you from the cinder pile when I aimed to catch it.
Q. That would be somewhere about——
A. About seven feet.
Q. From the edge of it?
A. Yes, sir.
Q. The crossing, that is the crossing that goes from Front street, the street that the Claiborne Hotel is on, down?

A. Yes, sir, down at the depot.

Q. Now, what kind of cinder pile was it, Mr. Jacobs? Describe the cinder pile to the jury.

200 A. To the best of my knowledge it was about eighteen or twenty inches, or may be twenty-four inches deep, and as long as across this room, and about the distance from here to Mr. Peterson, the width of it.

Q. Now, how did those cinders give way under your feet? Were they piled up close to the rail?

A. Yes, sir, right up against the rail. They sloped from the rail, and come up this way (indicating).

Q. Was it a steep slope, or slanting?

A. Steep.

Q. Describe to the jury exactly how those cinders caused you to fall.

A. As I caught the engine, I made several steps, and as I hit the cinder pile they commenced miring just like mud, and it caused me to fall, and when I fell in the cinder pile the journal box kept hitting and I couldn't get up. I tried, but couldn't.

Q. Why couldn't you?

A. Every time I made an effort the cinder pile gave way with me.

Q. Do you know which car ran over your leg?

A. I could not say for certain, but I think it was the first car. I didn't go clear under the engine, but went down by the journal box, and after the engine passed I rolled between the engine and

201 the car down by the rail, and I could not tell which car caught me, because everything hit me under there.

Q. Which leg was it that was cut off?

A. The right.

Q. It has to go in the record; of course the court and jury can all see it, but how high above the knee?

A. About two inches I guess, or three inches.

Q. Three inches above the knee?

A. Yes, sir.

Q. How old were you, Mr. Jacobs, when this injury occurred?

A. Twenty-three.

Q. You were twenty-three when you were hurt?

A. Yes, sir.

Q. Did you suffer much mental and physical pain?

A. I suffered very much physical pain, and mental, too.

Q. Have you any profession or professional business?

A. No, sir.

Q. How long were you laid up, Mr. Jacobs, from this injury?

A. Let me see: I was hurt the 19th, and I got out about the 17th of April, I think, on crutches.

202 Q. Something like four weeks?

A. Yes, sir. The leg never healed until April, 1912.

Q. Mr. Jacobs, was there anything to have prevented you from getting out of the way of the train but the cinder pile?

A. No, sir.

Q. If you had fallen without stumbling on the cinders?

A. I would have fallen clear of the track.

Q. Did you commence to stumble at all until you came in contact with the cinders?

A. No, sir.

Q. You did not?

A. No, sir.

By the COURT:

Q. As I understand you, you claim the cinder pile made you stumble and fall, and when you went to get up you were struck by the piece on the tender?

A. No, sir, I fell down behind the cinder pile. The cinder pile was sloping, and I fell down by the journal box, and the train was passing, and I rolled down next to the rail.

By Mr. BUFORD:

Q. When you say you fell behind, do you mean you fell between the cinders and the wheel?

203 A. Yes, sir.

Q. The slope of the cinders caused you to roll down next to the wheel?

A. Yes, sir.

Q. If there had been no cinders there, but you had fallen from some other cause, could you have gotten out of the way, out of danger?

A. Yes, sir.

By the COURT:

Q. Were the cinders which you stumbled over somewhat loose, or packed?

A. Yes, sir, somewhat miry like. They were mixed with the sparks—sparks out of the front of the engine.

By Mr. BUFORD:

Q. Were you conscious when you started to get on that engine, of any danger to you from coming in contact with this pile of cinders?

A. No, sir.

Q. Was it in your mind at all?

A. No, sir.

Q. Did you know that there was a pile of cinders there?

A. I had a knowledge of it, of the cinders being there, but I did not know that it was dangerous. I had forgotten them

204 & 205 being there at the time. I was watching when I was going to get on the engine—watching my feet, where I was going to step, and was not noticing the cinder pile.

Q. That was not in your mind, as I understand it?

A. No, sir, it was not in my mind.

By the COURT:

Q. Did you say the train was then fully made up and ready to leave?

A. No, sir; I guess it had about five or six cars at the time I was hurt.

By Mr. BUFORD:

Q. Five or six cars attached to it?
A. Yes, sir.
Q. What were you getting on the engine for?
A. To attend to my duties.
Q. To attend to your duties as fireman?
A. Yes, sir.
Q. Who was the engineer?
A. Mr. L. N. Stephenson.
Q. Was it customary for the engine, when it was shifting and making up trains like that, to stop for the men to get off and on?

206 A. No, sir, I have never seen it done in my life.

Q. What are your present means of making a living?
A. I haven't got any.
Q. You hav'n't got any?
A. No, sir.

By the COURT:

Q. What salary did you receive as fireman?
A. They are paid according to the trip. I made anywhere from $60.00 to $100.00. Sometimes I would not work all the time. It was according to the trips I made during the month.

Cross-examination.

By Mr. WILLIAMS:

Q. Mr. Jacobs, when did you go to work with the Southern?
A. February 17th, I believe, 1910. To the best of my knowledge and belief it was the 17th of February.
Q. Had you ever seen that cinder pile, Mr. Jacobs, accumulated there before the accident like it was at the time of the accident?
A. No, sir.
Q. What was the difference?
A. It was larger.

Q. How much larger?

207 A. A good deal larger. I could not exactly tell how much larger, but it was a good deal larger than I ever saw it before.

Q. When did you notice that it was so much larger?
A. I noticed it a day or two before.
Q. Before the accident?
A. Yes, sir.
Q. Why did you, after you had gone to Mr. Moody's—you say you went up there to get your breakfast?
A. To get my breakfast and dinner and a cooler of water.
Q. Did you get your breakfast?
A. No, sir.

Q. Why not?
A. Because they didn't have it. They had not finished it.
Q. Did I understand you did not expect to eat your breakfast, but expected to get it in a bucket?
A. Yes, sir.
Q. Why did you go on the south side?
A. On the north side.
Q. Moody's is on the north side?
A. Yes, sir.

Q. Why did you go across on the south side?
208 A. I had to climb a fence and come across a big steep bank, so I come across and went right down the road.

Q. When you saw the engine pulling up on the main track, going eastwardly, what did you understand the engine was going to do? How far did you expect it to go before it stopped?
A. There is no telling.
Q. How many cars, Mr. Jacobs, if you remember, were, at that time, attached to the engine?
A. About five or six.
Q. They were pulling out of one of the side tracks onto the main line?
A. Yes, sir.
Q. What was the object of doing that?
A. Switching cars to get them in place.
Q. In order to do that, how far would that engine move up the main line?
A. If it stopped exactly the length of the cars, I could not tell you exactly.
Q. If the object was to get the cars out of the side track, would not it move up the main line far enough to come back to get the cars on some other track?
209 A. To clear the switches it was coming out of, but they didn't always do that.
Q. What would be the object of going further east after the hindmost car had gotten fully on the main line?
A. Sometimes you can't see the brakeman in giving signals, and you want to see.
Q. The engineer would not go purposely any further than that, would he?
A. No.
Q. So when you saw the engine coming, you knew it was going to stop as soon as the rearmost car cleared the switch, didn't you?
A. Yes, sir.
Q. You knew that. After it cleared the switch, what would have been the next movement of that engineer, in the ordinary way of making up trains?
A. He would have backed out.
Q. He would have backed right down where you were?
A. He would have been running the same. He would have been running when he passed me again.

Q. While they are making up the trains on the yard, whose duty is it to take the signals from the brakeman?

210 A. The engineer and fireman both, if they are switching, from their sides. If from the fireman's side, it is the fireman's duty.

Q. If they were doing that switching while you were off getting your breakfast, you could not take those signals, could you?

A. No, sir. The signals, in switching from this end, are always given from the engineer's side.

Redirect examination.

By Mr. PETERSON:

Q. What do you mean—I didn't catch it exactly—what did you mean by saying the signals were given from the engineer's side?

A. In the east end here the signals are given from that side.

Q. Why are the signals from that side?

A. You can see better from that side, and most of the targets are on that side that you turn the switches from. There are one or two on this side, but they always run across, and turn the target, and then run across and give the signal.

Q. This train had five cars attached to the engine at the time?

A. Five or six.

Q. Now, where is the target or switch—I mean the target which operates the switch, on which the engine and five cars were moving?

A. Near the west end of the depot.

211 Q. Just about the depot?

A. Somewhere near the west end of the depot.

Q. If you had not boarded the engine there, you would have had to go five car lengths and the length of the engine down?

A. Yes, down towards the overhead bridge. If I had walked there, by the time I got there it would have been moving back this way.

Q. Is it not customary for the engineer to wait for you at any particular place?

A. No.

Recross-examination.

By Mr. WILLIAMS:

Q. You said you started working there in 1910, in February. You had been working there about eighteen months then?

A. Yes, sir.

Q. During that period had they been cleaning out ash-pans and piling these cinders up during all that period of time?

A. Yes, sir.

Q. That was the way section people did it, wasn't it?

A. Yes, sir.

By Mr. PETERSON:

Q. It is the custom of the railroad to discharge the cinders

212 from trains two and four at this point?

A. Yes, sir.

By Mr. WILLIAMS:

Q. Do you remember what time it was just before you were hurt?
A. I can come pretty near telling you. It was 6:20 or 6:25.
Q. Was the sun up?
A. Yes, sir.

JOHN A. MALLORY, on behalf of the plaintiff, being duly sworn, testified as follows:

Examined by Mr. BUFORD:

Q. Mr. Mallory, did you see the accident to Mr. Ralph B. Jacobs, which occurred on the morning of the 19th of August, 1911?
A. Yes, sir. It happened in two minutes after I arrived at the station.
Q. Tell the jury, as near as you can, what caused the accident?
A. I came in from towards the Southern Hotel, and right in front of the station I stepped up on one of the steps, and had my hand on the railing like that (indicating), fixing to go up on the porch, and I saw Mr. Jacobs coming across. The train was
213 making up east, and he came and took a stand, and I didn't know what he was waiting for, and he made an attempt to get on; it was not going fast, and he held his hold until he got to the pile of cinders thirty yards from the station, and when he struck it he seemed to tangle, and every time he would attempt to get on he would make a stumble, and rolled down.
Q. How high were they?
A. I reckon fully eighteen inches, but much higher further.
Q. The further they went down the track, the higher they got?
A. Yes. Where he struck them, I reckon they were about that high, (Indicating).
Q. You mean the cinder pile was about thirty yards from the station?
A. Yes, about thirty yards from the station, but he was not quite that far. He crossed the crossing. I reckon probably he was fifteen or eighteen—he lacked a few steps before he got to it. He was putting something on, and I think he put that on, but when he struck the cinders he went down, and he disappeared for a while, and then you could see him rolling, and the engine stopped. I ran and phoned for Dr. Lewis.

214 Cross-examination.

By Mr. WILLIAMS:

Q. How far do you say the cinder pile was west of the road there that crossed the track?
A. Thirty yards at the time the accident occurred.

By Mr. BUFORD:

Q. Not from the road?
A. From the station. Thirty yards exactly. I can tell now because the cinders are gone.

By Mr. WILLIAMS:

Q. I asked how far the cinder pile was from the crossing?
A. The cinder pile from the crossing was probably eighteen or twenty yards.
Q. How long is the cinder pile?
A. Somebody said here thirty yards.
Q. Didn't you see it?
A. Yes, sir. I reckon it was fully that.
Q. Fully what?
A. Twenty-five or thirty yards.

By the COURT:

Q. Yards or feet?
A. Feet.

215 By Mr. WILLIAMS:

Q. How wide was it?
A. Seven or eight feet. It was wider at the lower end than at this.
Q. Did you ever see that pile there before?
A. I don't remember. I have seen them accumulate there, and have seen then taking them away.
Q. How long have you seen that process going on?
A. I don't know.
Q. How long have you lived in Lawrenceville?
A. Thirteen or fourteen years.
Q. Have you seen it ever since you have lived in Lawrenceville?
A. I have seen them clean up the yard, and I have seen them accumulate.

The plaintiff rests.

R. G. RENFROW, on behalf of the defendant, being duly sworn, testified as follows:

Examined by Mr. WILLIAMS:

Q. Mr. Renfrow, have you got your train book with you?
A. No, sir.
Q. (The book is handed to the witness.) You were conductor in charge of this train at the time of the accident?
215½ A. Yes, sir.
Q. How long have you been working with the Southern Railway?
A. Thirteen years the sixth of last August.
Q. Now, does your duty require you to keep an accurate account of the movement of the cars in the various trains you handle?
A. I have to put them on a book, and give the destination of them.
Q. Have you got that book with you?
A. Yes, sir, here it is.
Q. Refreshing your memory with that book, tell the jury what

number of cars you were switching out of the side track onto the main line at the time of the accident?

A. Of the two cars?

Q. What number of cars you had hooked to the engine on that move?

A. I held four cars to come back into the yard to pick up two other cars I was carrying away in the train.

Q. How many cars were attached to the engine?

A. Six.

Q. Before you got the two last, you had four?

A. Yes, sir.

Q. What was your object in going back after those two cars on the side track?

216 A. So as to get them on the head of the train. They were to be set off at Emporia.

Q. You took up two cars off the side track, and pulled out on the main line, with the intention of backing them back to your train?

A. Yes, on the main line.

Q. Did you do that?

A. Yes, sir.

Q. Tell the jury what you did with the other four cars that were attached to the engine at the time of the accident?

A. I set them back in the yard, No. 1 track.

Q. Then that movement was for the purpose of getting out two cars?

NOTE.—Objected to as leading.

Q. What was the object of that movement?

A. To get the short hauls on the head of the train.

Q. Tell the jury, if you can, what two cars they were?

A. N. Y. P. & N. 1352 with a check local from here to Emporia, and set them out at Emporia; 136532 was a car of lumber destined to Franklin, but I set it off at Emporia to be sealed. Those were the two cars I was switching at the time of the accident.

Q. You said N. Y. P. & N. 1352?

A. Yes, sir.

217 Q. And Southern 136532?

A. Yes, sir.

Q. Where did you deliver those two cars?

A. Emporia.

Cross-examination.

By Mr. BUFORD:

Q. The other four cars composing you train had already been shifted out, and gotten on the main line?

A. I had five cars to my caboose car on the main line I had already switched out.

Q. And that included Southern car No. 30790?

A. Yes, sir. I had already had that switched on the main line.

Q. You had been previously switching that with the others, and gotten it on the main line?
A. Yes, sir.
Q. And the next movement you were to make was to couple to those cars, including Southern 30790, and proceed on your journey to Pinners Point?
A. Yes, sir.
Q. You got that car 30790 to Pinners Point, didn't you, on that trip?
218 A. Yes, sir.
Q. Carried it through?
A. Yes, sir.

T. B. GODFREY, on behalf of the defendant, being duly sworn, testified as follows:

Examined by Mr. WILLIAMS:

Q. What is your name?
A. Thomas B. Godfrey.
Q. Where do you live?
A. Suffolk.
Q. How were you employed the 19th of August, 1911?
A. By H. M. McClearry.
Q. Did you see this accident to Mr. Jacobs?
A. Yes, sir.
Q. Where were you sitting?
A. On the Midway Hotel porch.

NOTE.—A map is produced, and the witness was told to stand aside until the map could be proved by the engineer making it.

P. NELSON, being duly sworn, on behalf of the defendant, testified as follows:

219 Examined by Mr. WILLIAMS:

Q. You are one of the engineers of the Southern Railway?
A. Yes, sir.
Q. At my request, you came down here and made this map, did you?
A. Yes, sir.
Q. Is this map a fairly accurate portrayal of the situation which it purports to represent?
A. Yes, sir.
Q. I see you have marked here a point where Jacobs fell?
A. Yes, sir.
Q. Why did you put that mark at that point?
A. Mr. Godfrey showed me the location.
Q. You do not know where he fell, but you put it there because Mr. Godfrey told you?
A. Yes.

Mr. WILLIAMS: I now offer this map in evidence. Marked Exhibit "A."

T. B. GODFREY resumes the stand for further examination.

By Mr. WILLIAMS:

Q. Now, Mr. Godfrey, please look at this map, and tell the jury where you were sitting at the time you saw Mr. Jacobs get hurt?

220 A. Sitting right on the back porch.

Q. Of what house—marked on the map what?

A. Midway Hotel.

Q. What did you first notice about him, Mr. Godfrey?

A. He was coming over the railroad track.

Q. Go on and tell the jury what he did, and how he got hurt, and where he got hurt?

A. I first noticed him starting over the railroad track with a cooler in his hand. I noticed him coming over, and took my eyes off of him, and didn't notice him any more until he was on the cinders, and I noticed he fell, and the cars knocked him down, and he tried to get up, and it looked that it knocked him down three or four times.

Q. How far from the crossing did you estimate him to be when he fell?

A. I estimated about fifty feet, and when I seen it measured it was forty-nine feet.

Q. Did you tell Mr. Nelson in order that he might put it on the map where he fell?

A. Just about it.

Q. How do you fix where he fell?

A. I put a little piece of cinder on the track.

221 Q. When did you do that?

A. This morning.

Q. For what purpose?

A. To show Mr. Nelson where he fell.

Q. How many feet was he to the eastward of the western end of the cinder pile when he fell, according to your best estimate?

A. I don't know, sir, exactly. I judge that he was about half way of it.

By the COURT:

Q. Halfway what?

A. Halfway of the cinder pile.

By Mr. WILLIAMS:

Q. Did he wait for the train to come up, or was he walking along with the train coming back of him, or how was he relative to the train, just before he was hurt?

A. It looked like he was going towards the county bridge when he was grabbing the train. I don't reckon I had my eyes on him half a minute.

Cross-examination.

By Mr. BUFORD:

Q. Mr. Godfrey, you saw Mr. Jacobs come across the railroad?

222 A. Yes, sir.

Q. Down at the crossing?

A. Yes, sir.

Q. Did you see him stop and make an effort to get on the train?

A. No, sir, not at the crossing.

Q. You don't really know—when your attention was first attracted, he was being knocked down, and dragged, wasn't he?

A. No, sir. My first attention, it looked to me like he was trying to grab the engine up on the cinder pile—and that was not the first attention: The first attention was coming across the railroad, and I took my eyes off him, and didn't notice him any more until it looked like he was trying to grab the engine on the cinder pile.

Q. Kind of stumbling?

A. Yes, sir.

Q. And falling?

A. Yes, sir.

Q. And being knocked down?

A. I didn't see him knocked down until I reckon after his leg was hurt, and the cars were hitting him.

Q. Do you reckon you are mistaken about his leg being hurt?

A. I couldn't tell.

223 Q. Were you in position to see when he fell?

A. Yes, sir, I was sitting opposite him.

Q. When did you first mark this place on the railroad where you thought he fell?

A. This morning.

Q. So, in fixing any particular place down there where he actually did fall, you are speaking now from recollection of what happened more than eighteen months ago?

A. Yes, sir.

Q. Was your view unobstructed when you saw him fall—you had an unobstructed view of him?

A. I don't understand what you mean.

Q. There was nothing between you and him—you could see him clearly?

A. Yes, sir.

Q. What kind of structure is the well house down there, Mr. Godfrey?

A. A square built place like.

Q. How high is it?

A. The roof and all?

Q. Yes.

A. I judge the top of the roof is fourteen or fifteen feet.

Q. Is it latticed up?

224 A. It is not latticed around the sides. You can see all the way through the well, if I am not mistaken.

Q. Can you see over it?
A. Yes, sir.
Q. Does not the curbing come up pretty high?
A. The wood part comes up three or four feet.
Q. What apparatus have they got for drawing water?
A. I don't know, sir.
Q. Was it right straight between you and Mr. Jacobs when he fell?
A. No, sir. He was on the left of the well from the porch, the way I was sitting.
Q. You were sitting on the porch, and he was——
A. (Interposing:) To the left of the well.
Q. When he finally fell?
A. Yes, sir.
Q. Are you certain you mean to the right or to the left?
A. The left. The way I was sitting, to my left. The same as I am sitting here, and he was here, and fell to the left of the well (illustrating).
Q. How far from the well?
A. Just about opposite the well.

225 Redirect examination.

By Mr. WILLIAMS:

Q. Now, Mr. Godfrey, look at this map here again. Tell the jury so that they can see where you were sitting.
A. I was sitting just about right along here (indicating).
Q. So that the stenographer can get it, say you were sitting on the lefthand side of the porch of the Midway Hotel.
A. I was sitting on the lefthand side of the porch of the Midway Hotel.
Q. And you saw him on the cinder pile when he fell?
A. Yes, sir.
Q. And you say he was to the left of that well, which appears in front of that porch?
A. Yes, sir.

W. A. BUTLER, on behalf of the defendant, being duly sworn, testified as follows:

Examined by Mr. WILLIAMS:

Q. Mr. Butler, did you see this accident to Mr. Jacobs in August last?
A. Not when he fell. I didn't see him until afterwards.
226 Q. Tell what you did see of it?
A. I was sitting on the back porch, you might call it, the porch next to the railroad of the Midway Hotel. I heard some one make a noise, or holler, and I looked and saw some one under the wheels, and his feet were going like that (indicating), trying to get out.
Q. Tell the jury on this map where you were sitting—point it out?

A. This is the porch. I was sitting over this side of the step. Jacobs fell about forty-nine feet from the road or crossing on the east side of the driveway, when I saw him. Where he fell at first I don't know.

Q. How near was he when you first saw him to the middle of the cinder pile?

A. Very near to the middle of it. His shoulder was up on the middle of it, and his feet were down towards the rail.

Q. How long have you been living there, Mr. Butler?

A. Three years the first day of last January.

Q. Has that cinder pile been accumulating there, and taken away, and piled up again ever since you have been there?

A. Ever since I have been there.

Cross-examination.

By Mr. BUFORD:

227 Q. Mr. Butler, what did you say first attracted your attention to this?

A. Somebody hollered, or made a noise of some kind. I was sitting there reading, or writing, on the back.

Q. Some noise of distress?

A. Yes, sir. I looked up and saw Mr. Jacobs. I thought at first it was Mr. Clift Williams. He was on the crew. In fact, I hollered to my wife to phone for the doctor, that I would go there, that Clift Williams was cut all to pieces. I went there, and then saw it was Mr. Jacobs, and went back to the phone, and I could not get central, and Mr. Johnson ran up and got the doctor. He said the doctor stated that central had just rung up.

Q. Nothing attracted your attention before you heard this cry?

A. No.

Q. When you looked, you saw Mr. Jacobs being knocked down, or thrown down?

A. Yes, sir, but I never saw him get under the train. He was on the pile trying to shove back, and I do not think that they turned him over after I saw him.

Q. The cinders were giving, and he was trying to crawl out?

A. I don't know about that. He was on his elbow trying to shove out.

228 By Mr. PETERSON:

Q. On his back?

A. Yes, on his back. I was the nearest to him, and he turned out.

By Mr. BUFORD:

Q. You had not noticed him before you saw him in that position?

A. I might have seen him out there, but I had not noticed him until then.

A. D. FLOWERS, on behalf of the defendant, being duly sworn, testified as follows:

Examined by Mr. WILLIAMS:

Q. Mr. Flowers, how are you engaged now?
A. As supervisor.
Q. Supervisor for whom?
A. Southern Railroad between Lawrenceville and Danville.
Q. How long have you been so engaged?
A. About six years.
Q. Where do you live?
A. Lawrenceville.
Q. Are you familiar with the manner in which the cinders have been piled here, near Lawrenceville, by the passenger trains,
229 during the last six years?
A. Yes, sir.
Q. Tell the jury what is the method and practice of the company with regard to this cinder pile?
A. The trains from the west clean their ash-pans east of the depot, and the trains from the east clean their ash-pans west of the depot, and we clean the cinders out from the track, and throw them out, and they accumulate a load, and then we clean them—that has been for the last ten or twelve years. I have had charge of the road force the last eight years, and have been supervisor the last six years.
Q. Look at this map, and get into your head the location. Here is the Midway Hotel, and here is the passenger depot, and there is the street crossing (indicating on map); I want you to show the jury where, on that map, that cinder pile is located?
A. That cinder pile starts somewhere along here, and runs back down this way—somewhere along here. It starts off from the crossing probably some ten or fifteen feet. It starts gradually, and goes on off the same way.
Q. What tracks are there along in that part of the railroad?
A. The main line, and then there is a siding here. We throw them up on both sides—between the siding and the main line,
230 and some on this side.

Cross-examination.

By Mr. BUFORD:

Q. You say the cinders were how many feet—ten or fifteen?
A. Somewhere along there, or fifteen or twenty feet.
Q. From the outer edge of the driveway?
A. Yes, sir.
Q. And they extend along down there?
A. Yes, sir.

By Mr. WILLIAMS:

Q. About how far do they extend?
A. About fifty or sixty feet, from one end to the other.

By Mr. BUFORD:

Q. There is a switch signal down next to the overhead bridge?
A. Yes, sir.
Q. All of this is used by the company in making up and shifting its trains, and loading and unloading its trains?
A. Yes, sir, but they hardly ever come down lower than that. They get out a few cars sometimes; sometimes they will get a car out of the house track.
231 Q. These double tracks are used for the purpose of shifting and making up trains, and loading and unloading freight?
A. This is the main line.
Q. I know that, but this here (indicating on the plat)?
A. Yes, that is the house track.
Q. What do you mean by house track?
A. It is next to the depot. We call it "house track" because we place the cars and put them up next to the house.
Q. The men have to come down as far as the signal post?
A. Yes, to go into the house track.
Q. And operate up and down there, too?
A. Yes.
Q. You say until you get a load, you let those cinders accumulate?
A. Yes.
Q. Do you mean a car load?
A. Yes, sir. We have a cinder car on the yard for hauling and handling cinders—a small car.
Q. Have you any cinder pit on the yard?
A. At the shop.
Q. What is a cinder pit?
A. They are used for cleaning engines at the shops. We do not have one on the yard for cleaning passenger engines.
232 Q. A cinder pit is a pit used by railroad companies?
A. They are not used in cleaning trains in transit, but used for cleaning dead engines.
Q. Are you certain that that cinder pit is not a part of the railroad equipment used by the railroads generally?
A. Not for trains in transit. You have got to take them out of the train, and put them over the cinder pit.

Redirect examination.

By Mr. WILLIAMS:

Q. You have been asked about a cinder pit. Please tell the jury, from the standpoint of danger, what would be your judgment about fixing a cinder pit where these cinders were thrown out?

Mr. BUFORD: We simply say that *that* this has nothing whatever to do with the case. What we were talking about was putting cinders in a pit instead of in a pile.

The COURT: I thought you meant to indicate to the jury that there ought to be a cinder pit there to put the cinders in.

Mr. BUFORD: My question had this object, to ascertain if good

management of a railroad did not call for a cinder pit somewhere in which to empty the cinders, instead of piling up a mound of cinders upon the yard. I did not say anything about putting
233 a cinder pit there.

The COURT: I over-rule the objection.

Mr. BUFORD: Then we except to the question.

A. I think a cinder pit at this point would be more dangerous than the cinder pile. People would be liable to fall into it.

By Mr. WILLIAMS: That is all.

By the COURT: Do you want to ask anything more about cinder pits?

By Mr. BUFORD: No, sir.

By the COURT: If you want to take out your testimony about the cinder pit, I will take out his.

By Mr. BUFORD: No, sir, I do not put it on that ground. We reserve the point.

The defendant rests.

R. B. JACOBS, the plaintiff, recalled, in rebuttal, testified as follows:

Examined by Mr. BUFORD:

Q. Mr. Jacobs, come over here please, sir, and explain this map to the jury. From the points of the compass, that is the way the map is?

A. Yes, sir.

234 Q. This is on the north side of the track?

A. Yes, sir.

Q. Mr. Butler and Mr. Godfrey think when you fell you were at about that point, which is forty-nine feet from the driveway across the track. Explain to the jury, please, as nearly as you can, where you undertook to get on the train?

A. I come across here, from down in front of Captain Harrison's. Say Captain Harrison's is here (indicating).

Q. Not pointing, it would be further down in front of the switch point?

A. Yes. I crossed here, and stopped and waited for the engine, and the engine was pulling out of one of these side tracks, I think this one (indicating on the map). When it came along, I aimed to catch it, and ran along, and made a few steps, and I got on and tripped, and fell on the cinders, and I caught my foot a few steps, and after I lost my balance and fell I held to the engine a good little ways, but I can't tell how far it was down here, and it broke my hold. After it broke my hold, the engine knocked me a good ways.

Q. So you were carried that far in your effort to extricate yourself from the position?

235 A. Yes, sir, but I was not near the end of the cinder pile when they got me out, because I crawled out myself after the last car pulled over me.

Q. What?

A. I say I don't think I was near the end of the cinder pile.

Q. They put you about half way.
A. The last car rolled over me, and I crawled out on the cinder pile, and lay there until somebody got me.

By Mr. PETERSON:

Q. Do you know how many wheels passed over your leg?
A. I couldn't say how many wheels, but six cars passed over my body.
Q. Over your body?
A. Yes, sir; every car passed over me.
Q. Did you get under the car?
A. I was under there a part of the time. I was across the rail a part of the time, but I got out some how.
Q. You do not mean the wheels passed over your body?
A. No, sir. I was on the rail, but I got out in time to avoid the wheel. I tried to pull myself up the cinder pile, and I got clear of the box, but not of the wheel. It would pull me back, but
236 I got out.
Q. That was after the train had run over your leg?
A. Yes, sir. I didn't know I had lost my leg until I got out. I thought maybe it had hit it and bruised it, but I did not know I had lost my leg until I got out.

By Mr. BUFORD: We call the court's attention to the Employers' Liability Act. We are through.

The plaintiff rests in rebuttal.

By Mr. WILLIAMS: There was one question I was confident I had asked the witness, but in reviewing the notes of the stenographer I can't find it.

A. D. FLOWERS, recalled, testified as follows:

By Mr. WILLIAMS:

Q. How long have you known the way that these cinders had been piled as you recounted in your testimony?
A. Eleven or twelve years.
Q. You are supervisor here?
A. Yes.
Q. Had any gotten hurt on that cinder pile before Mr. Jacobs?
237 A. No, sir.

Mr. BUFORD: We object.
The COURT: Is that all you want to ask?
Mr. WILLIAMS: That is all.
The COURT: Stand aside, Mr. Flowers.
Mr. PETERSON: Your Honor notes our objection to that last question. We do not think it is material. Another man may have been lucky.
Mr. BUFORD: Take the Blandford case—no one was hurt there.
Mr. WILLIAMS: One of the questions is whether or not the leav-

ing of these cinders was negligence. That is a question for the jury. If you can show that that same condition of affairs was maintained eleven or twelve years, and nobody has been hurt in all that length of time, it looks now like common sense that it is a matter to be considered by the jury.

The COURT: The jury is discharged until to-morrow morning at ten o'clock, and the objection is over-ruled.

Mr. PETERSON: Your Honor will note our exception.

End of testimony.

238 And be it further remembered, and the court doth hereby certify, that the evidence above set forth, was all the evidence adduced for the plaintiff, or for the defendant, and thereupon the court charged and instructed the jury as follows:

"(1) The court instructs the jury, as a matter of law upon the uncontradicted evidence in this case, that at the time the plaintiff received the injury mentioned in the declaration, the defendant was a common carrier by railroad engaging in interstate commerce, and that the plaintiff was a person employed by the defendant, as such common carrier in such commerce, and that this action is governed by, and is to be determined in accordance with, the provisions of the Act of Congress approved April 22, 1908, known as the Employers' Liability Act.

"(2) If the jury believe from the evidence that at the time of receiving the injury mentioned in the declaration the plaintiff was employed by the defendant as a fireman upon its freight train number 62, and that the defendant was the proprietor of and used and operated the railroad yard and tracks and roadbed at the town of Lawrenceville for the purposes alleged in the declaration, it was the duty of the defendant to use ordinary care to maintain and keep said railroad tracks and roadbed in a reasonably safe con-
239 dition for the performance by the plaintiff of the duties required of him in his services as such fireman.

"(7) If the jury find for the plaintiff they should ascertain his damages not to exceed the sum claimed in the declaration, to-wit: $20,000.00; and in estimating such damages the jury may allow such sum as they may believe from the evidence will be a fair compensation for such bodily suffering as the plaintiff may have been caused by the said injury; and they may also allow such sum as may compensate him for the future loss of his earning capacity as far as the jury may believe from the evidence that he has suffered a loss of his earning capacity as a result of said injury; and they may also allow such sum as will enable him to relieve or mollify the inconvenience occasioned by the said injury if they believe from the evidence that he will in the future experience such inconvenience. But if the jury believe from the evidence that the plaintiff was himself guilty of negligence which contributed to cause the said injury, the damages shall be diminished by the jury in proportion to the amount of negligence, if any, which they may believe from the evidence is attributable to the plaintiff.

"(A) The court instructs the jury that if they believe from the

evidence that the existence of the cinder pile was known to
240 the plaintiff, or that he had been working on the Southern Railway at Lawrenceville for more than a year, and that the cinders had been piled at the same place in the way described by the witnesses for many years prior to the accident, and that the plaintiff had failed to show that he had made complaint or objection on account of the cinder pile, then he assumed the risk of danger from the cinder pile, if there was any danger in it, and the Act of Congress approved April 22, 1908, permits this defence, and the jury should find their verdict for the defendant.

"(G) The court instructs the jury that the gist of this action is negligence on the part of the defendant, and the burden of proof is upon the plaintiff to show to the satisfaction of the jury by evidence that the defendant in allowing the cinders to accumulate along the track was guilty of negligence.

"(H) The court further instructs the jury that if they believe from the evidence that the cinders piled along the said railroad track at the place of the injury were piled in a reasonably safe manner, and that such method was known to the plaintiff at the time of the injury complained of, and that the plaintiff in returning to his duty attempted to mount his engine while standing upon the said pile of cinders, and in doing so fell under the train and received the injury complained of, they must find for the defendant."

241 And be it further remembered that these were all the instructions given by the court to the jury upon the trial of this cause.

And the jury having heard the evidence set forth in this bill of exceptions and the instructions given by the court and set forth in this bill of exceptions, and the arguments of counsel, returned a verdict in favor of the defendant, in the following words: "We, the jury, find for the defendant."

And thereupon the plaintiff, by counsel, in apt time moved the court to set aside the said verdict upon the ground that the same is contrary to the law and the evidence, but the court overruled the said motion and entered judgment upon said verdict in favor of the defendant, to which action and ruling of the court in refusing to set aside the said verdict and award the plaintiff a new trial upon the ground that the same is contrary to the law and the evidence, and in entering judgment thereon in favor of the defendant, the plaintiff, by counsel, then and there duly excepted, and tendered to the court this, his seventh bill of exceptions and prayed that the same may be signed, sealed, enrolled and made a part of the record in this cause, which is accordingly done.

JESSE F. WEST, [SEAL.]
Judge of the Circuit Court of Brunswick County, Virginia.

242 VIRGINIA:

Circuit Court of Brunswick County.

RALPH B. JACOBS
v.
SOUTHERN RAILWAY COMPANY.

Bill of Exceptions No. 8.

Be it remembered that on the trial of this cause, after the plaintiff to sustain the issue on his part, and the defendant to sustain the issue on its part, had, respectively, introduced the evidence set forth in plaintiff's bill of exceptions No. 7, and after the court had instructed and charged the jury as set forth in said bill of exceptions No. 7, and the jury had returned their verdict in favor of the defendant in the following words, "We, the jury, find for the defendant," as set forth in said bill of exceptions No. 7, to which said bill of exceptions reference is here made, and the evidence, instructions of the court, and verdict of the jury set forth therein, are hereby adopted as fully as if the same were fully set forth in this bill of exceptions, the plaintiff, by counsel, in apt time moved the court to set aside the said verdict and award him a new trial upon the ground that the court erred in refusing to give to the jury instructions numbered 3, 4, 5 and 6, requested by the plaintiff and refused by the court as set forth in said plaintiff's bill of exceptions No. 1, which is here referred to as fully as if said instruction so refused by the court, as set forth in said bill of exceptions, were here set forth at length, but the court over-ruled the said motion and refused to set aside the said verdict and award the plaintiff a new trial, to which action and ruling of the court in refusing to set aside said verdict and grant him a new trial, the plaintiff then and there duly excepted, and tendered this, his eighth bill of exceptions, and prayed that the same may be signed, sealed, enrolled and made a part of the record in this cause, which is accordingly done.

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JESSE F. WEST, [SEAL.]
Judge of the Circuit Court of Brunswick County, Virginia.

VIRGINIA:

Circuit Court of Brunswick County.

RALPH B. JACOBS
v.
SOUTHERN RAILWAY COMPANY.

Bill of Exceptions No. 9.

Be it remembered that on the trial of this cause, after the plaintiff to sustain the issue on his part, and the defendant to sustain the issue

on its part, had, respectively, introduced the evidence set forth in plaintiff's bill of exceptions No. 7, and after the court had in-
244 structed and charged the jury as set forth in said bill of exceptions No. 7, and the jury had returned their verdict in favor of the defendant in the following words, "We, the jury, find for the defendant," as set forth in said bill of exceptions No. 7, to which said bill of exceptions reference is here made, and the evidence, instructions of the court and the verdict of the jury set forth therein, are hereby adopted as fully as if the same were fully set forth in this bill of exceptions, the plaintiff, by counsel, in apt time moved the court to set aside the said verdict and award him a new trial upon the ground that the court erred in giving to the jury the said instruction marked A, requested by the defendant and given by the court, as set forth in plaintiff's said bill of exceptions No. 2, which is here referred to as fully as if the said instruction so given by the court, as set forth in said bill of exceptions, were here set forth at length, but the court over-ruled the said motion and refused to set aside the said verdict and award the plaintiff a new trial, to which action and ruling of the court in refusing to set aside said verdict and award him a new trial, the plaintiff, by counsel, then and there duly excepted and tendered this, his ninth bill of exceptions, and prayed that the same may be signed, sealed, enrolled and made a part of the record in this cause, which is accordingly done.

JESSE F. WEST. [SEAL.]
Judge of the Circuit Court of Brunswick County, Virginia.

245 Exhibit "A" filed with deposition of P. Nelson, diagram of tracks, etc., near the scene of the accident.

I hereby certify that the foregoing is a true copy of the record in the case of Ralph B. Jacobs v. Southern Railway Company.

Teste:

W. T. SLEDGE, *Clerk.*

I hereby certify that the notice required by section 3457 of the Code of Virginia, was given to William Leigh Williams, attorney for the defendant, by the attorneys for the plaintiff, before the transcript of the record aforesaid was made out.

Given under my hand this 5th day of November, 1914.

W. T. SLEDGE, *Clerk.*

Clerk's fee for Copy of Record, $35 35/100.

246 VIRGINIA:

In the Supreme Court of Appeals, Held at the Library Building, in the City of Richmond, on Tuesday, the 10th Day of November, 1914.

The petition of Ralph B. Jacobs for a writ of error and supersedeas to a judgment rendered by the circuit court of Brunswick county

on the 3rd day of September, 1914, in a certain action at law then therein depending wherein the said petitioner was plaintiff and the Southern Railway Company was defendant, having been maturely considered and the transcript of the record of the judgment aforesaid seen and inspected, the court being of the opinion that the said judgment is plainly right, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said circuit court of Brunswick county.

A copy.

Teste:

H. STEWART JONES, *C. C.*

247 In the Supreme Court of Appeals of Virginia, at Richmond.

I, H. Stewart Jones, Clerk of the said Court, do hereby certify that the writings annexed to this certificate are true copies of the originals on file and of record in my office, and that said originals, together, constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of the said court, this the 4th day of December, 1914.

H. STEWART JONES, *Clerk.*

I, James Keith, President and one of the Judges of the Supreme Court of Appeals of the State of Virginia, do hereby certify that the foregoing is the true and genuine signature of H. Stewart Jones, Clerk of the said Court, and that the foregoing attestation made by him is in due form.

Witness my hand and seal this the 4th day of December, 1914.

JAMES KEITH, *President.* [SEAL.]

I, H. Stewart Jones, Clerk of said Court, do hereby certify that the Honorable James Keith, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, President of the Supreme Court of Appeals of the State of Virginia, duly commissioned and qualified.

Witness my hand and the seal of the said court, this the 4th day of December, 1914.

[Seal Supreme Court of Appeals of Virginia, Richmond.]

H. STEWART JONES, *Clerk.*

248 RALPH B. JACOBS
VS.
SOUTHERN RAILWAY COMPANY.

It is hereby stipulated and agreed between counsel for the parties to this cause that the testimony appearing in the manuscript record now on file in the Supreme Court of the United States, from page — to page —, inclusive, shall be omitted from the printed record, and shall not be printed therein, for the reason that this testimony is

identical with the testimony introduced at the second trial held at the September term, 1914, of the Circuit Court of Brunswick County, Virginia, and appearing later on in said manuscript record.

The testimony hereby directed to be omitted in printing the record for the Supreme Court of the United States, being the testimony commencing on page 31 of the printed record for the Supreme Court of Appeals of Virginia, down to and including the clause on page 83, "This is the testimony referred to in Bill of Exceptions No. —, —— ——, Judge."

Given under our hands this 14th day of April, in the year 1915.

EDWARD P. BUFORD,
Attorney for Ralph B. Jacobs,
Plaintiff in Error.

WILLIAM LEIGH WILLIAMS,
Attorney for the Southern Railway Company,
Defendant in Error.

[Endorsed:] 773/24517.

249 [Endorsed:] File No. 24,517. Supreme Court U. S., October term, 1914. Term No. 773. Ralph B. Jacobs, Pl'ff in Error, vs. Southern Ry. Co. Stipulation to omit parts of record in printing. Filed April 23, 1915.

Endorsed on cover: File No. 24,517. Virginia Supreme Court of Appeals. Term No. 326. Ralph B. Jacobs, plaintiff in error, vs. Southern Railway Company. Filed January 18th, 1915. File No. 24,517.

EDWARD P. BEDFORD

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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1915.

RALPH B. JACOBS, PLAINTIFF IN ERROR,

v.

SOUTHERN RAILWAY COMPANY,
DEFENDANT IN ERROR.

No. 326.

ON WRIT OF ERROR TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is an action under the Employers' Liability Act of April 22, 1908 (U. S. Stat. at L. 65, c. 149) for personal injury sustained by the plaintiff in the loss of his right leg.

At the time of the injury the plaintiff was in the service of the defendant as a fireman on its freight train, designated as train 62, running between Lawrenceville and Norfolk, Virginia.

The declaration alleges that the defendant was a common carrier by railroad "engaging in * * * interstate commerce;" that the plaintiff was "a person employed by said defendant in such commerce;" that the plaintiff, while attempting to board the engine of train 62 in the discharge of his duty, came in contact with a pile of cinders which caused him to stumble and be thrown under the moving train, the wheels of which ran over his leg and inflicted the injury complained of; and that the presence of the pile of cinders was due to the negligence of the defendant "through its agents, servants and employees, other than the plaintiff," in causing the cinders to be placed alongside and in dangerous proximity to its railroad track (R. 24-26).

There is little or no conflict in the evidence. The facts relied upon by the plaintiff to sustain his contention are practically admitted.

The accident occurred on August 19, 1911, in the defendant's railroad yard at Lawrenceville, the divisional point between Norfolk and Danville on the Norfolk and Danville division of the Southern Railway. The road from Lawrenceville to Norfolk is known as the eastern division and that from Lawrenceville to Danville as the western division. The western division lies partly in the State of Virginia and partly in the State of North Carolina.

The character of the Norfolk and Danville division as a part of a railway system engaged in interstate commerce is described in the testimony of J. S. Bergman, Division Superintendent. This division connects at Danville with the defendant's main line which runs from Washington through Virginia and the other Southern States. It connects at Norfolk with boats plying between New York,

Baltimore, Philadelphia and Washington, and with other railroads engaged in interstate commerce (R. 46).

The function of train 62 as an instrumentality of interstate commerce likewise appears from the testimony of the Division Superintendent. This train is made up at Lawrenceville, but is composed of cars brought to Lawrenceville by train 64 from the western division as well as of cars originating at Lawrenceville. Its function is to carry both interstate and intrastate shipments originating at Lawrenceville and between Lawrenceville and Norfolk, and also interstate and intrastate shipments brought to Lawrenceville from the western division by train 64 (R. 44-5-6).

At the time of the accident, train 62 was being shifted and made up on the Lawrenceville yard preparatory to its departure on its eastward trip to Pinner's Point, the Norfolk terminal. The regular engine and train crew of train 62, with the exception of the plaintiff who had gone to his boarding house to procure a cooler of water for himself and the engineer, were engaged in doing the shifting. When finally made up, train 62 consisted of Southern car 10753, A. C. L. car 29093, N. Y. P. & N. car 1352, Southern car 133479, *Southern car 30790*, Southern car 11956, and Southern car 136532, besides the engine, tender and caboose (R. 35).

Southern car 30790, which had been brought to Lawrenceville as a part of train 64 from the western division the evening before, contained shipments of freight originating at Oxford, North Carolina, consigned to Emporia, Virginia, shipments from Drake's Branch, Virginia, consigned to New York, and shipments from Chase City, Virginia, consigned to Philadelphia (R. 39).

In the process of shifting Southern car 30790, the caboose and four other cars forming a part of the train had been placed in position on the main line. Two other cars remained to be added. The engine had been connected with those two cars and four others on the side track

and was moving forward "about as fast as anybody could walk" (R. 53) towards the switch for the purpose of making the final movement necessary to connect with the residue of the train standing on the main line, and then proceeding to Pinner's Point (R. 61-2).

As this movement was being made the plaintiff, who had returned with the cooler of water, was awaiting the engine at the highway crossing a few feet to the east of the depot. As the engine passed he attempted to board it "to attend to his duties" as fireman (R. 56); but in the effort to do so he came in contact with the pile of cinders and, stumbling in its yielding mass, was dragged beneath the wheels of the cars, which severed his right leg two or three inches above the knee as one after another they passed over him (R. 54). The circumstances of the accident are thus described by the plaintiff:

> "We commenced switching, and I took the water cooler and got off the engine up at the depot, and started to the house to get water. I went up the hill to Mrs. Moody's, the place I boarded, and intended to get my breakfast and dinner at the same time. When I come on back across the bridge, and come down by Captain Moody's—in front of Captain Moody's—not Moody's, but Harrison's—and came down the railroad road—I don't know what street it is, and come across the track on the crossing. At the time the train was pulling out of the last track. So I waited until the train was pulling up there, and aimed to catch it, and when I aimed to catch it I made three or four steps to get on it, you know, and I got to the cinder pile before I knew it, and I tripped, and went under the engine."
>
> * * * * * * * *
>
> "A. As I caught the engine, I made several steps, and as I hit the cinder pile they commenced miring

just like mud, and it caused me to fall, and when I fell in the cinder pile the journal box kept hitting, and I couldn't get up. I tried, but couldn't." (R. 51-54.)

* * * * * * * *

"Q. Do you know how many wheels passed over your leg? A. I couldn't say how many wheels, but six cars passed over my body.

"Q. Over your body? A. Yes, sir; every car passed over me.

"Q. Did you get under the car? A. I was under there a part of the time. I was across the rail a part of the time, but I got out somehow.

"Q. You do not mean the wheels passed over your body? A. No, sir. I was on the rail, but got out in time to avoid the wheels. I tried to pull myself up the cinder pile, and I got clear of the box, but not of the wheel. It would pull me back, but I got out.

"Q. That was after the train had run over your leg? A. Yes, sir. I didn't know I had lost my leg until I got out. I thought maybe it had hit it and bruised it, but I did not know I had lost my leg until I got out."

* * * * * * * *

"A. The last car rolled over me, and I crawled out on the cinder pile, and lay there until somebody got me." (R. 70.)

The defendant made no provision of water for the use of the men in the cab; the employees were themselves compelled to attend to this physical need as best they might (R. 52). It was the custom of the train men while shifting on the yard to get on and off the moving trains as the plaintiff was attempting to do when he received the injury; the practice was common and was acquiesced in and apparently approved by the defendant's officers. When asked whether

or not it was done with the knowledge of the officers, the plaintiff replied: "It has been customary ever since I have been on the road; they all knew it and I have seen it done hundreds of times a day, I reckon." He also testified that he had been furnished no rule forbidding it and had never been instructed not to do so (R. 53).

The obstruction which was the proximate cause of the injury was a mass of cinders which lay by the side of the track several feet east of the point at which the plaintiff attempted to get upon the engine (R. 54). This mass was from 18 to 24 inches in depth, 50 or 60 feet in length, and 7 or 8 feet in width. The heap varied in bulk from time to time. Its presence was due to the negligent habit of other officers, servants and agents of the defendant in allowing cinders discharged from its engines attached to east-bound passenger trains to accumulate at this point until those employees saw fit to remove them.

The existence of the pile of cinders was not constant. There were frequent intervals when the tracks were entirely free of such accumulations. After their periodical removal considerable time would elapse before the heap had gradually swollen to the size which it had attained on the day of the accident. The cinder pile was consequently not an ever-present or continuous obstruction.

The plaintiff knew of the habit of discharging the cinders on the yard (R. 59) and that at the time of the accident the accumulation was larger than usual, having "noticed it a day or two before" (R. 57); but he was unconscious of the danger to which the cinders exposed him. His testimony on this point is as follows:

> "Q. Were you conscious, when you started to get on that engine, of any danger to you from coming in contact with this pile of cinders? A. No, sir.
>
> "Q. Was it in your mind at all? A. No, sir.

"Q. Did you know that there was a pile of cinders there? A. I had a knowledge of it, of the cinders being there, but I did not know that it was dangerous. I had forgotten them being there at the time. I was watching when I was going to get on the engine—watching my feet, where I was going to step, and was not noticing the cinder pile.

"Q. That was not in your mind, as I understand it? A. No, sir; it was not in my mind." (R. 55-6.)

The plaintiff at the time of the accident was twenty-three years of age; he had been employed by the defendant in the capacity of fireman for about eighteen months—since February, 1910. Independently of his wages, he had no means of livelihood. For his service as fireman he received from the defendant a sum estimated, according to the time which he might make upon his engine, at from $60.00 to $100.00 per month (R. 56).

THE PROCEEDINGS.

This action was brought in the circuit court of the county of Brunswick. There were two trials in that court. The first trial, had on March 5, 1913, resulted in a verdict for the plaintiff for $12,000, on which judgment was rendered in his favor on April 24, 1913 (R. 30). On a writ of error awarded by the Supreme Court of Appeals of Virginia, this judgment was reversed upon the grounds, as held by the Supreme Court of Appeals, that the circuit court erred (1) in giving instruction No. 2 (R. 72) at the request of the plaintiff and (2) in refusing to give instruction A (R. 74) at the request of the defendant (R. 84).

On the second trial, had on September 3, 1914, the circuit court refused to give to the jury certain instructions requested by the plaintiff and gave over the plaintiff's objection certain instructions requested by the defendant. The

instructions given on the second trial, especially instruction A, compelled a verdict for the defendant, upon which judgment was rendered in its favor by the circuit court. The plaintiff thereupon presented to the Supreme Court of Appeals his petition for a writ of error and supersedeas to the last mentioned judgment (R. 86 *et seq.*), but the court, by its final judgment rendered on November 10, 1914, rejected his petition and refused the writ of error and supersedeas, the effect of which was "to affirm the judgment of the said circuit court of Brunswick county" (R. 141-42).

The Supreme Court of Appeals having sustained the plaintiff's contentions: (1) that at the time of the accident the defendant was engaging in interstate commerce, and that he was employed by it in such commerce; and (2) that the presence of the pile of cinders on the defendant's yard warranted the finding of actionable negligence by the jury as a matter of fact (R. 76-7), the questions presented for the determination of this court on this writ of error, in the absence of cross-error with respect to those rulings, involve the application of the act of Congress to the facts thus judicially established. The general questions are:

(1) Under the facts of this case, can "assumption of risk" be made an issue; and, if so, does instruction A requested by the defendant correctly apply the common-law doctrine?

(2) Is the plaintiff chargeable with either assumption of risk or contributory negligence?

(3) Can the common law doctrine of assumption of risk of the employer's *negligence* be pleaded in bar of recovery for liability imposed by the act of Congress?

These questions are involved in the rulings of the Supreme Court of Appeals: (1) in reversing the judgment rendered in favor of the plaintiff on the first trial and (2) in affirming the judgment rendered in favor of the defendant on the second trial. The questions are raised

by assignments of error to the rulings of the court respecting instructions, given and refused by the trial court on both trials, and the final action of the trial court in overruling the plaintiff's motion to set aside the verdict returned in favor of the defendant on the second trial.

The evidence upon the two trials was identical (R. 35-71—R. 100-138). The instructions, the giving and refusal of which are made the subjects of discussions, are fully set forth in the specifications of error. Those given on the second trial are to be found on pages 138-9 of the record. For the convenience of the court they are here quoted in the foot-note:[1]

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[1] Instructions given on the second trial and approved by the Supreme Court of Appeals (R. 138-9):

"(1) The court instructs the jury, as a matter of law upon the uncontradicted evidence in this case, that at the time the plaintiff received the injury mentioned in the declaration, the defendant was a common carrier by railroad engaging in interstate commerce, and that the plaintiff was a person employed by the defendant, as such common carrier in such commerce, and that this action is governed by, and is to be determined in accordance with, the provisions of the Act of Congress approved April 22, 1908, known as the Employers' Liability Act."

"(2) If the jury believe from the evidence that at the time of receiving the injury mentioned in the declaration the plaintiff was employed by the defendant as a fireman upon its freight train number 62, and that the defendant was the proprietor of and used and operated the railroad yard and tracks and roadbed at the town of Lawrenceville for the purposes alleged in the declaration, it was the duty of the defendant to use ordinary care to maintain and keep said railroad tracks and roadbed in a reasonably safe condition for the performance by the plaintiff of the duties required of him in his services as such firemen."

"(7) If the jury find for the plaintiff they should ascertain his damages not to exceed the sum claimed in the declaration, to-wit: $20.000.00; and in estimating such damages the jury may allow such sum as they may believe from the evidence will be a fair compensation for such

SPECIFICATIONS OF ERROR.

On behalf of the plaintiff the following errors are assigned:

1. The Supreme Court of Appeals of Virginia erred in holding and deciding by its judgment rendered on March 12, 1914, that the judgment of the circuit court of the county of Brunswick, rendered in favor of the plaintiff on April 24, 1913, against the defendant, for the sum of $12,000.00, with interest thereon from March 5, 1913, and costs, be set aside and reversed, and that a new trial be awarded the defendant.

The errors in said judgment are more particularly set forth as follows:

(a) The said Supreme Court of Appeals erred in holding and deciding by the judgment aforesaid that the circuit court of the county of Brunswick erred in giving to the jury instruction No. 2 at the request of the plaintiff, in the following words (R. 72):

> "The court further instructs the jury that knowledge by the plaintiff of the unsafe character or condition of the said roadway is of itself no defense to an action for injury caused to him thereby. Such knowledge, however, if the jury believe from the evidence that he had such knowledge, may be con-

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bodily suffering as the plaintiff may have been caused by the said injury; and they may also allow such sum as may compensate him for the future loss of his earning capacity as far as the jury may believe from the evidence that he has suffered a loss of his earning capacity as a result of said injury; and they may also allow such sum as will enable him to relieve or mollify the inconvenience occasioned by the said injury if they believe from the evidence that he will in the future experience such inconvenience. But if the jury believe from the evidence that the plaintiff was himself guilty of negligence which contributed to cause the said in-

sidered by the jury along with all the evidence in the case in determining whether the plaintiff was himself guilty of negligence, which contributed to produce the injury mentioned in the declaration; but the fact that the plaintiff may himself have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of contributory negligence, if such there were, which they may believe from the evidence was attributable to said plaintiff under the circumstances."

(b) The said Supreme Court of Appeals erred in holding and deciding by the judgment aforesaid that the circuit court of the county of Brunswick erred in refusing to give to the jury instruction marked A requested by the defendant, in the following words (R. 74):

"The court instructs the jury that if they believe from the evidence that the existence of the cinder pile was known to the plaintiff, or that he had been working on the Southern Railway at Lawrenceville for more than a year, and that the cinders had been piled at the same place in the way described by the witnesses for many years prior to the accident, and

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jury, the damages shall be diminished by the jury in proportion to the amount of negligence, if any, which they may believe from the evidence is attributable to the plaintiff."

"(A) The court instructs the jury that if they believe from the evidence that the existence of the cinder pile was known to the plaintiff, or that he had been working on the Southern Railway at Lawrenceville for more than a year, and that the cinders had been piled at the same place in the way described by the witnesses for many years prior to the accident, and that the plaintiff had failed to show that he had made complaint or objection on account of the cinder pile, then he assumed the risk of danger from the cinder

that the plaintiff had failed to show that he had made complaint or objection on account of the cinder pile, then he assumed the risk of danger from the cinder pile, if there was any danger in it, and the Act of Congress approved April 22, 1908, permits this defense, and the jury should find their verdict for the defendant."

2. The said Supreme Court of Appeals erred in refusing by its judgment rendered on November 10, 1914, to award the plaintiff a writ of error and *supersedeas* to the final judgment of the said circuit court rendered on September 3, 1914, in favor of the defendant on the second trial, the effect of which refusal to award the plaintiff a writ of error and *supersedeas* was to affirm the judgment of the circuit court rendered in favor of the defendant on September 3, 1914.

The errors in the last mentioned judgment are more particularly set forth as follows:

(a) The said Supreme Court of Appeals erred in affirming the ruling and judgment of the said circuit court in refusing to give to the jury on the second trial instruction No. 3 requested by the plaintiff in the following words (R. 91):

"If the jury believe from the evidence that the officers, agents, and employees of the defendant,

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pile, if there was any danger in it, and the act of Congress approved April 22, 1908, permits this defense, and the jury should find their verdict for the defendant."

"(G) The court instructs the jury that the gist of this action is negligence on the part of the defendant, and the burden of proof is upon the plaintiff to show to the satisfaction of the jury by evidence that the defendant in allowing the cinders to accumulate along the track was guilty of negligence."

or any of them, negligently caused, suffered or permitted the pile of cinders mentioned in the declaration to be placed, and to be, remain and accumulate upon and alongside the main line of its railroad track or roadbed upon its railroad yard at the town of Lawrenceville, in dangerous proximity to the said railroad track, and that the plaintiff suffered the injury mentioned in the declaration, and that such injury resulted in whole or in part from the negligence of the said officers, agents and employees of the said defendant, or any of them, in so negligently causing, suffering or permitting the said pile of cinders to be placed, and to be, remain and accumulate, upon and alongside the said railroad track or roadbed as aforesaid, they should find for the plaintiff."

(b) The said Supreme Court of Appeals erred in affirming the ruling and judgment of the said circuit court in refusing to give to the jury on the second trial instruction No. 4 requested by the plaintiff in the following words (R. 91-2):

"If the jury believe from the evidence that the defendant, through its officers, agents and employees, or any of them, negligently caused, suffered or permitted the pile of cinders mentioned in the

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"(H) The court further instructs the jury that if they believe from the evidence that the cinders piled along the said railroad track at the place of the injury were piled in a reasonably safe manner, and that such method was known to the plaintiff at the time of the injury complained of, and that the plaintiff in returning to his duty attempted to mount his engine while standing upon the said pile of cinders, and in doing so fell under the train and received the injury complained of, they must find for the defendant."

declaration, to be placed and to be, remain and accumulate upon and alongside the main line of its railroad track or roadbed, upon its railroad yard, at the town of Lawrenceville, in dangerous proximity to the said railroad track or roadbed, and that said pile of cinders constituted a defect or insufficiency in the said railroad track or roadbed of the said defendant, due to the negligence of the said defendant, and that the plaintiff suffered the injury mentioned in the declaration, and that such injury resulted in whole or in part from such defect or insufficiency in the said railroad track or roadbed, due to the negligence of the said defendant as aforesaid, in so negligently causing, suffering or permitting the said pile of cinders to be placed and to be, remain and accumulate upon and alongside the said railroad track or roadbed, as aforesaid, they should find for the plaintiff."

(c) The said Supreme Court of Appeals erred in affirming the ruling and judgment of the said circuit court in refusing to give to the jury on the second trial instruction No. 5 requested by the plaintiff in the following words (R. 92):

"The fact that the plaintiff may have had knowledge of the existence of the pile of cinders mentioned in the declaration is not a bar to an action for injury caused to him thereby. Such knowledge, however, if the jury believe from the evidence that he had such knowledge, may be considered by the jury along with all the evidence in the case in determining whether the plaintiff was himself guilty of negligence, which contributed to produce the injury mentioned in the declaration; but the fact that the plaintiff may himself have been guilty of contribu-

tory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of contributory negligence, if such there were, which they may believe from the evidence was attributable to said plaintiff under the circumstances."

(d) The said Supreme Court of Appeals erred in affirming the ruling and judgment of the said circuit court in refusing to give to the jury on the second trial instruction No. 6 at the request of the plaintiff, in the following words (R. 92-99):

> "In order to charge the plaintiff with contributory negligence, which the jury are to consider in mitigation of damages, the jury must believe from the evidence not only that the plaintiff knew of the existence of the pile of cinders, but also that the danger occasioned by the said pile of cinders was known to him, or was so obvious that a man of ordinary prudence would have appreciated such danger, and not have attempted as the plaintiff did, to get upon the engine at the time and under the circumstances disclosed by the evidence."

(e) The said Supreme Court of Appeals erred in affirming the ruling and judgment of the said circuit court in giving to the jury on the second trial instruction marked A requested by the defendant in the following words (R. 94):

> "The court instructs the jury that if they believe from the evidence that the existence of the cinder pile was known to the plaintiff, or that he had been working on the Southern Railway at Lawrenceville for more than a year, and that the cinders had been piled at the same place in the way described by the

witnesses for many years prior to the accident, and that the plaintiff had failed to show that he had made complaint or objection on account of the cinder pile, then he assumed the risk of danger from the cinder pile, if there was any danger in it, and the Act of Congress approved April 22, 1908, permits this defense, and the jury should find their verdict for the defendant."

(f) The said Supreme Court of Appeals erred in affirming the ruling and judgment of the said circuit court in refusing to set aside the verdict of the jury rendered in favor of the defendant on the second trial, had on September 3, 1914, as aforesaid, upon the ground that the said verdict is contrary to the law and the evidence.

(g) The said Supreme Court of Appeals erred in affirming the ruling and judgment of the circuit court in refusing to set aside the verdict of the jury rendered in favor of the defendant on the second trial, had on September 3, 1914, as aforesaid, and award the plaintiff a new trial, upon the ground that the circuit court erred in refusing to give to the jury instructions numbered 3, 4, 5 and 6, requested by the plaintiff, as hereinbefore set forth.

(h) The said Supreme Court of Appeals erred in affirming the ruling and judgment of the circuit court in refusing to set aside the verdict of the jury, rendered in favor of the defendant on the second trial, had on September 3, 1914, as aforesaid, and award the plaintiff a new trial, upon the ground that the circuit court erred in giving to the jury instruction A, requested by the defendant and hereinbefore set forth.

ARGUMENT.

It is to be observed that the refusal of the court on the second trial to give instructions 3, 4, 5 and 6 requested by the plaintiff left him without an issue to be submitted to

the jury. The action of the court in giving instruction A on the second trial withdrew the case from the jury and peremptorily directed a verdict for the defendant upon the facts hypothetically stated in that instruction. Instruction A in terms purports to be the court's construction of the Employers' Liability Act. It concludes with these words: "The Act of Congress approved April 22, 1908, permits this defense, and the jury should find their verdict for the defendant."

If this be a correct construction of the Act, the railroad employee engaged in interstate commerce is indeed unfortunate. The attempt of Congress to ameliorate his condition has resulted in making him a legal outcast. He is deprived by the Federal statute of the protection afforded intrastate employees by the remedial legislation of the states. By this instruction he is denied the stinted redress afforded by the common law to all other victims of bodily injury. As a litigant he is *sui generis* and the statute, regarded as the culmination of a national movement for his benefit, is made the pretext for applying to him a doctrine the severity of which finds no justification even in common-law precedents. This action of the court, in Wolsey's phrase, leaves him "naked to his enemies."

The plaintiff was injured as a result of a dangerous condition created by the negligence of the defendant's "officers, agents or employees" in another department of the service.. *Kansas City, Ft. S. & G. R. Co.* v. *Kier* (Kan.), 21 Pac. 770. He did not appreciate the danger thus created. He was not at the cinder pile when he undertook to board the engine. He was in the public highway at the railway crossing. He came in contact with the cinders as he walked beside the engine with his attention engrossed by his effort to board it. His positive testimony is that he did not know of the danger, and there is no fact in evidence from which such knowledge could be presumed. His knowledge of the existence of the pile of cinders is con-

sistent with his ignorance of the danger to which its presence exposed him. There was nothing in its external appearance to apprise him, on casual observation, of the *latent* danger resulting from the looseness of the mass. The defendant's effort to acquit itself of the charge of negligence on the part of those of its servants who were charged with knowledge of its dangerous character, is inconsistent with its contention that the plaintiff, whose duty as a fireman was not concerned with the accumulation, was himself chargeable with knowledge of the danger. As a locomotive fireman he was under no duty to examine the consistency of the heap of cinders. He was entitled to assume that the yard was free from such a danger as that which caused his injury. *Texas P. R. Co.* v. *Harvey,* 228 U. S. 319-21; *Kirbo* v. *Southern R. Co.* (Ga.), 84 S. E. 491; *Baltimore & O. R. Co.* v. *Whiteacre* (Md.), 92 Atl. 160.

If there was no error in the action of the circuit court on the first trial, in giving plaintiff's instruction No. 2 and in refusing defendant's instruction A, both decisions of the Court of Appeals should be reversed and the judgment of the circuit court for the plaintiff should be affirmed. This would render the consideration of errors on the second trial unnecessary. *Hudgins* v. *Simon,* 94 Va. 659.

Instruction No. 2 was drawn before the decision in *Seaboard Air Line Ry.* v. *Horton,* 233 U. S. 492, 58 L. ed. 1062, was rendered. The theory of the instruction is that common-law assumption of risk of the carrier's *negligence* is not a bar to recovery.

On the facts of the case, under the common-law rule, *assumption of risk can not be an issue.* The instruction, therefore, is not *reversible error* under the doctrine announced in *Seaboard Air Line Ry.* v. *Horton* that assumption of risk may be a bar to recovery under the act. The employee, as held in that case, does not assume the risk—

> "until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them."

Instructions 3, 4, 5 and 6, requested by the plaintiff on the second trial are in harmony with *Seaboard Air Line Ry.* v. *Horton.* These instructions are so obviously correct that no reason is perceived for their refusal except that the decision of the Court of Appeals on the first appeal made instruction A "the law of the case."

Since the action of the circuit court in refusing to give instruction A on the first trial was made a ground for the reversal of the judgment in favor of the plaintiff, and its action in giving it on the second trial compelled the verdict against him, this instruction is made the crucial one in the case.

In support of the action of the circuit court in refusing instruction A and in giving instruction No. 2 on the first trial, we desire to submit for the consideration of the court these three propositions:

(1) That instruction A does not correctly state the common-law doctrine of assumption of risk;

(2) That assumption of risk is not an issue, under the facts of this case, and therefore consistently with *Seaboard Air Line Ry.* v. *Horton,* instruction No. 2 was properly given; and

(3) That common-law assumption of dangers created by the *negligence* of the carrier or any of its officers, agents or employees can not bar recovery under the Act of Congress.

DEFENDANT'S INSTRUCTION "A" ERRONEOUS AT COMMON LAW.

Viewed solely with reference to common-law principles, instruction A is erroneous in each of the following particulars:

(a) It ignores the uncontradicted testimony of the plaintiff that he did not know that the cinders were dangerous, and therefore violates the fundamental principle that an instruction is erroneous which *directs a verdict* on a partial view of the evidence. 38 Cyc. 1627.

In *Greenleaf* v. *Birth*, 9 Pet. 292, 9 L. ed. 132, it was held that the trial court,

> " * * * cannot legally give any instruction which shall take from the jury the right of weighing the evidence and determining what effect it shall have. In this view the circuit court did not err in refusing the above instruction."

The plaintiff's positive testimony that he was not aware of the danger precludes the contention that he assumed the risk. *Texas P. R. Co.* v. *Swearingen*, 196 U. S. 51, 49 L. ed. 382-387.

(b) It does not submit the question, as one of *fact*, to the jury. It charges the plaintiff with assumption of risk as a *matter of law*.

It contains the intimation that there was *no* danger "from the cinder pile," and yet it tells the jury that if "the existence of the cinder pile was known to the plaintiff or that he had been working on the Southern Railway at Lawrenceville for more than a year, and that the cinders had been piled in the way described by the witnesses for many years prior to the accident, and that the plaintiff had failed to show that he had made complaint or objection on account of the cinder pile then he assumed the risk of

danger from the cinder pile if there was any danger in it."

It announces the novel proposition that whenever *any* abnormal danger exists—whether known or unknown, obvious or latent, remote or imminent—the servant as a *matter of law* is held to have assumed the risk if only he has knowledge, or an opportunity to acquire knowledge of the physical condition from which the danger results.

To charge a servant with assumption of risk, as a matter of law, the danger must be so obvious and imminent that a person of ordinary prudence would not undertake the service. When the danger is not of that character the question of assumption of risk is one of *fact for the jury. Choctaw, O. & G. R. Co.* v. *McDade,* 191 U. S. 64-68; *Texas P. R. Co.* v. *Swearingen,* 196 U. S. 51; *McGovern* v. *Phila. & Reading R. Co.,* 235 U. S. 389; *Seaboard Air Line Ry.* v. *Padgett,* 236 U. S. 668; *Phoenix Mut. Ins. Co.* v. *Doster,* 106 U. S. 32.

(c) It directs a verdict in favor of the defendant upon either of two alternative grounds: (1) "if they (the jury) believe from the evidence that the *existence* of the cinder pile was known to the plaintiff"; and (2) "or if he had been working on the Southern Railway at Lawrenceville for more than a year and that the cinders had been piled at the same place in the way described by the witnesses for many years prior to the accident."

It contains no intimation that actual or even constructive knowledge of the resulting *danger* is also essential to the imputation of assumption of risk. It charges the employee, as a matter of law, with assumption of risk upon the theory that from the facts hypothetically stated he might by an independent investigation have discovered the danger. It does not even use the phrase "by the exercise of ordinary care," which this court has so frequently declared is not the "true test" of assumption of risk. *Choctaw &c. R. Co.* v. *McDade,* 191 U. S. 64; *Texas P. R. Co.* v. *Archibald,* 170 U. S. 665; *Seaboard Air Line Ry.* v. *Horton, supra.*

In *Rase* v. *Minneapolis &c. R. Co.*, 124 N. W. 360, 21 L. R. A. n. s. 138, criticising the contention that assumption of risk may be imputed to the employee when by "ordinary care" he might discover the danger, the court said:

> "Indeed, the misuse of ordinary care in this direction has usually been the result of inadvertence, and has often been the sequence to mere casual inaccuracy in language. The test has rarely, if ever, been the result of deliberate consideration of principle or precedents. As Mr. Justice White pointed out in *Texas P. R. Co.* v. *Archibald*, 170 U. S. 665, 42 L. ed. 1188, 18 Sup. Ct. Rep. 777, 779, 'no reason can be found for, and no authority exists supporting, the contention.' It would be a work of supererogation to add to the authorities there cited. They exist, however, in large numbers."

Assumption of risk in the sense of an affirmative defense relied upon by the master to relieve himself from liability for his own *negligence* is dependent wholly upon the servant's knowledge of the existence of the danger. Without such knowledge there can be no assumption of risk. *Yazoo & Miss. V. R. Co.* v. *Wright*, 35 Sup, Ct. Rep. 130.

To charge the servant with assumption of risk the evidence (1) must show that he was "chargeable with knowledge of the material conditions which were the immediate cause of his injury," and (2) must establish his "appreciation of the dangers produced by the abnormal conditions."

> "That this is the alternative and crucial element upon which the defense depends is sufficiently apparent from the terminology by which it is described. * * * Any charge which may lead the jury to suppose that the defense of assumption of risk is

available to the master if the servant was aware merely of the existence of certain abnormal conditions is a misdirection." 3 Labatt's M. & S. (2d ed.) 1190, pp. 3207-3211.

"Before the defense of assumption of risk can be invoked, it must appear that the plaintiff appreciated the full extent of the danger to which he was subjected." *Graseth* v. *Northwestern Knitting Co.*, 150 N. W. 804.

Ignoring this essential element, the instruction is amenable to the criticism applied by the New Jersey court to one of a similar but less objectionable character:

"Stripped of this concept, the request propounded is too broad, has no legal boundaries, and becomes a waif without lawful parentage." *Durand's Admx.* v. *N. Y. & L. B. R. Co.*, 48 Atl. 1015.

(d) It charges assumption of risk upon an hypothesis lacking the essential elements of that doctrine and inadequate to charge contributory negligence.

"Whatever may be the difficulty of distinguishing in many cases between the application of the doctrine of assumption of risk and the principles of contributory negligence, that there is no such difficulty here is apparent, since the facts as stated absolutely preclude all inference that the engineer knew, or, from the facts shown, must be presumed to have known, that the coal cars were protruding over the track on which he was moving, and deliberately elected to assume the risk of collision and great danger which would be the inevitable result of his continuing the forward movement of his train. The impossibility of deducing assumption of risk from the facts stated

> is cogently demonstrated by the arguments advanced to establish the risk was assumed." *Yazoo & Miss. V. R. Co.* v. *Wright,* 35 Sup. Ct. Rep. 130.

To the extent that common-law assumption of risk may be made a defense to liability imposed by the act, the plaintiff is entitled in this court to have the doctrine properly applied. Besides, the court below by express declaration makes instruction A *its* interpretation of the Act of Congress.

ASSUMPTION OF RISK NOT AN ISSUE IN THIS CASE.

For the foregoing reasons it appears not only that instruction A is erroneous as a statement of the common-law doctrine of assumption of risk, but also that on the facts of this case assumption of risk can not properly be made an issue. Consequently, if the language of plaintiff's instruction No. 2, "knowledge by the plaintiff of the unsafe character or condition of the said roadway is of itself no defense to an action for injury caused to him thereby" (R. 72) be too strong a statement when at common law the evidence would warrant the interposition of this defense, it is harmless here. This language was inserted not as an admission of such knowledge, but to cover every legal element of *contributory negligence,* with which the instruction deals.

> "Unless appellee not only knew the conditions, but also knew of the dangers arising therefrom, he could not be charged with negligence in failing to avoid them." *Holcomb* v. *Norman,* 91 N. E. 625-8.

Since knowledge of the danger which produces the injury is "not only an element or factor, but a very important one" (*Norfolk & W. R. Co.* v. *Cheatwood,* 103 Va. 336;

Buckner v. *Richmond & D. R. Co.*, 72 *Miss.* 873) in contributory negligence, it is difficult to conceive of an instruction on that subject which does not embrace the element of knowledge. *Schlemmer* v. *Buffalo, etc., R. Co.*, 220 U. S. 590, 55 L. ed. 596; *Louisville & N. R. Co.* v. *Lankford*, 209 Fed. 321; *Herrick* v. *Quigley*, 41 C. C. A. 294.

In *Illinois Central R. Co.* v. *Nelson*, 122 C. C. A. 258, the plaintiff, a brakeman, fell on a pile of cinders which the defendant permitted to accumulate on its yard, several inches in height and about ten feet in length, which was covered with ice and snow. He was struck and injured by a passing car. This being negligence on the part of the defendant, the only question was as to the propriety of instructions on the element of contributory negligence as diminishing the damages.

The plaintiff, however, is not chargeable with contributory negligence. The law in this aspect of the case is correctly stated in his instruction 4, requested on the second trial. The danger was not known to him and was not so obvious as to have deterred an ordinarily prudent person from attempting under the circumstances to perform his duty. It is to be remembered that the plaintiff did not attempt to board the engine from a position on the mass of cinders. He undertook in the first instance to mount the steps of the cab from a point in the public street, where he had awaited its slow approach from the west, and unwittingly encountered the cinders east of the street crossing as he walked beside the locomotive oblivious of their presence. Instruction No. 2 was therefore more favorable to the defendant than the law required.

Assumption of Risk Not a Bar to Recovery Under Act of Congress.

If assumption of risk of the *negligence* of the carrier or of its officers, agents or employees is not a defense, no error

could have been committed on the first trial in giving instruction No. 2 or in refusing instruction A, whatever might have been the evidence respecting the plaintiff's knowledge or lack of knowledge of the danger.

The question is: Does the employee's continuance in service with knowledge of the danger and without complaint bar recovery under the act? A negative answer to this question involves the reconsideration of the conclusion reached in *Seaboard Air Line Ry.* v. *Horton, supra.*

It is respectfully submitted that the decision in that case should be reviewed. The considerations upon which the true construction of the act depends were not suggested to the court. The case was argued upon a mistaken view of the questions really involved.

Points Not Presented in Argument in Seaboard Air Line Railway v. Horton.

"As a court is naturally apt to discuss a case upon the theory under which the record and arguments present it," it is to be regretted that so far-reaching a question should for the first time in this court have been discussed by counsel on both sides upon a theory which treated the fourth section of the act not as a part of a general scheme of legislation but rather as the phraseology of an isolated enactment.

The theory seems to have been that the purpose of the fourth section was to deal with common-law "assumption of risk" of the carrier's *negligence;* and that for some reason unexplained the subject was but partially dealt with. The argument for the employee, to quote from the reported brief of his counsel, was that:

> "The laws of North Carolina have abolished assumption of risk as a defense, and Congress, in the act under consideration, having left open this part of the field, the state law governs, and assumption of

risk can in no case be pleaded in an action brought under the act in the State courts of North Carolina."

The following propositions, which exclude the possibility of assumption of risk as a defense in bar under the statute, do not appear to have been suggested to the court:

1. That there is no *Federal* common-law doctrine of assumption of risk with which what was assumed to be an omission in the fourth section to deal fully with the common-law doctrine might be "pieced out."

2. That the fourth section does not deal with common-law assumption of risk of the carrier's *negligence*, and therefore there is no such omission.

3. That the fourth section was designed to extend the *Federal* liability created by the first section, by displacing the rule established in *Glenmont Lbr. Co* v. *Roy*, 126 Fed. 524, and similar cases, that the violation by the employer of safety appliance statutes is not, in the absence of express provision, actionable negligence *quoad* the injured employee and that such violation remains a "risk of his employment."

4. That the purpose of the fourth section was to make "the violation of any statute enacted (by Congress) for the safety of employees," negligence *per se* as to the injured employee, and thereby to exclude the common-law doctrine of "the employer's choice of methods," as to statutory appliances, in determining what is actionable *negligence* under the act.

5. That such a defense as common-law assumption of risk of the carrier's negligence under the Act of Congress is *impliedly* excluded by the unconditional liability created by the first section, and is *expressly* forbidden by the fifth section.

6. That the affirmance by this court (220 U. S. 605, 55 L. ed. 607) of the decision of the Court of Appeals of the District of Columbia in the case of *Philadelphia, B. & W. R. Co.* v. *Tucker*, 35 App. D. C. 123, is in effect a decision

that assumption of risk is not a defense under the present statute.

7. That this common-law defense is subversive of the general policy of the act.

8. That common-law assumption of risk is irreconcilable with the specific provisions of the act in the following particulars:

(a) It is in conflict with the *unconditional* liability created by the first section for injury "resulting in whole or *in part* from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

(b) It is in conflict with the provision of the third section that "the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

(c) It is in conflict with the provision of the fifth section that "any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void * * * "

No more vital question can arise in the application of the act than that concerning the status of assumption of risk under its provisions. The question is fundamental in any construction of its terms and decisive of its value as an act of remedial legislation. Its decision necessitates a judicial determination of the character and purpose of the act—whether the legislation was in furtherance of the policy evinced in the legislation of the states, or is in fact a reactionary measure designed to displace state legislation to the extent that the abolition of assumption of risk by the states had inured to the benefit of employees of interstate carriers.

Assumption of risk in its ramifications is the underlying vice of the common law as applied to modern industrial conditions. It is the doctrine which exempts the employer from liability for his own negligence, however gross; it is the basic principle of the law of fellow-service; and, according to some decisions (*Malcolm* v. *Fuller*, 150 Mass. 160-167), it is the ultimate basis of the defense of contributory negligence.

It is evident, therefore, that the introduction of this defense into the system of Federal liability created by the Act of Congress, subverts the policy of the act and renders its specific provisions impossible of application—and worse than that, for the act supplants the remedial legislation of the states. With this all-pervading doctrine of the common law judicially construed into the act, the last state of the interstate employee would be worse than the first.

In view of these considerations, on behalf of the plaintiff, whose case was tried before *Seaboard Air Line Ry.* v. *Horton* was decided, we respectfully request this Honorable Court to permit us to submit for its consideration a construction of the act which does not seem to have been suggested in any case heretofore presented for its determination.

In our construction of the act if the plaintiff had had *actual knowledge* of the *danger* such knowledge would not bar recovery and would be material only as an element of contributory negligence to be considered in mitigation of damages. We desire again, however, to emphasize our contention that, for the reasons already presented, the plaintiff's lack of knowledge of the danger precludes the defense of assumption of risk even at common law.

Terms of the Act.

The act of April 22, 1908, stripped of its verbiage irrelevant to this discussion, is as follows:

"That every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

* * * * * * * *

"Sec. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this Act to recover damages for personal injuries to an employee * * * the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured * * * shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury * * * of such employee.

"Sec. 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this Act to recover damages for injuries to * * * any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury * * * of such employee.

> "Sec. 5. That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void * * * "

ASSUMPTION OF RISK DEFEATS POLICY OF ACT.

The constitutionality of this statute was sustained in *Mondou* v. *N. Y. &c. R. Co.*, 223 U. S. 1-54, 56 L. ed. 327-346, upon the following ground:

> "The natural tendency of the changes described is to impel the carriers to avoid or prevent the negligent acts and omissions which are made the bases of the rights of recovery which the statute creates and defines; and as whatever makes for that end tends to promote the safety of the employees and to advance the commerce in which they are engaged, we entertain no doubt that in making those changes Congress acted within the limits of the discretion confided to it by the Constitution."

In that case the court also said:

> "We are not unmindful that that end was being measurably attained through the remedial legislation of the several states, but that legislation has been far from uniform, and it undoubtedly rested with Congress to determine whether a national law, operating uniformly in all the states, upon all carriers by railroad engaged in interstate commerce, would better subserve the needs of that commerce."

In *Michigan Central R. Co.* v. *Vreeland*, 227 U. S. 59, 57 L. ed. 417, it is said:

> "We may not piece out this Act of Congress by resorting to the local statutes of the state of procedure or that of the injury. The Act is one which relates to the liability of railroad companies engaged in interstate commerce to their employees while engaged in such commerce. The power of Congress to deal with the subject comes from its power to regulate commerce between the states. Prior to this Act Congress had not deemed it expedient to legislate upon the subject, though its power was ample. 'The subject,' as observed by this court in Second Employers' Liability Cases, 'is one which falls within the police power of the state in the absence of legislation by Congress.' By this Act Congress has undertaken to cover the subject of the liability of railroad companies to their employees injured while engaged in interstate commerce. This exertion of power which is granted in express terms must supersede all legislation over the same subject by the state."

In *Seaboard Air Line Ry.* v. *Horton*, the court held that "by the phrase 'any statute enacted for the safety of employees,' Congress evidently intended Federal statutes, such as the Safety Appliance Acts and the Hours of Service Acts"; and then proceeded to place upon the fourth section the following interpretation:

> "It seems to us that sec. 4, in eliminating the defense of assumption of risk in the cases indicated, quite plainly evidences the legislative intent that in all other cases such assumption shall have its former effect as a complete bar to the action. And, taking sections 3 and 4 together, there is no doubt that Congress recognized the distinction between contributory negligence and assumption of risk; for, while it is declared that neither of these shall avail

> the carrier in cases where the violation of a statute has contributed to the injury or death of the employee, there is, with respect to cases not in this category, a limitation upon the effect that is to be given to contributory negligence, while no corresponding limitation is imposed upon the defense of assumption of risk—perhaps none was deemed feasible."

Assumption of risk is the common-law doctrine by which the employee, *guilty of no fault*, was denied recovery notwithstanding his injury resulted from a danger created by the employer's negligence, if, after becoming chargeable with knowledge of the danger, he continued in the service without complaint. It is a doctrine against the injustice of which in its application to modern railroad service the legislation of the states has been chiefly directed.

Whether the assumption finds its common-law justification in "grounds of economic theory" or in a "conception of justice and convenience" is one of the unsolved problems of the law. *Schlemmer* v. *Buffalo, etc., R. Co.*, 205 U. S. 1, 51 L. ed. 681-86. Whatever may be the basis of its justification, this principle of the common law if construed into the statute destroys its character as an act of remedial legislation. With this destructive doctrine engrafted upon it, the Act of Congress, viewed as a regulation of interstate commerce, so far from having a tendency "to promote the safety of the employees and to advance the commerce in which they are engaged," in fact relegates the subject to the crude and artificial rules of the common law, except as to that comparatively small class of "defects and insufficiencies" which result from the violation of *statutes* enacted for the safety of employees.

The Hours of Service Act does not deal with instrumentalities. The Safety Appliance Acts cover only a part of the appliances used in connection with "cars and engines." The

common-law immunity to the carrier from the consequences of its own negligence would, therefore, be re-instated as to everything of a physical nature embraced in the comprehensive terms, "machinery, track, roadbed, works, boats, wharves, or other equipment," and even as to "cars, engines and appliances," except to the limited extent to which appliances to be used in connection with cars and engines have been prescribed by statute.

The decision in *Seaboard Air Line Ry.* v. *Horton* rests upon the theory that the act does not "cover the subject," and that what is regarded as an omission in the act is to be "pieced out" by recourse to the common law. It is respectfully submitted that this decision is a departure from the principle stated in *Michigan Central R. Co.* v. *Vreeland.*

Since *Seaboard Air Line Ry.* v. *Horton* originated in the State of North Carolina, where assumption of risk has been abolished by statute, it is difficult to perceive from what source was derived the common-law principle which the court applied. Apparently the attention of the court was not directed to the legal basis or source of authority of the common law as a rule of decision in the United States. The discussion of the case seems to have assumed the existence of a *common-law* doctrine of assumption of risk, which state legislation is powerless to repeal, and which is available to "piece out" what was conceived to be an omission in the fourth section to deal fully with common-law assumption of risk.

The argument apparently proceeded on the theory that the Act of Congress occupies with respect to the common law the same relation as an Act of Parliament, and that the Liability Act, although enacted in the exercise of the exclusive power of legislation vested in Congress by the commerce clause of the Constitution and as a distinct Act of Federal sovereignty, is to be regarded merely as an act amendatory of the common law. And what common law? Not the common law of the state, for the state had abolished the principle which the court applied.

Proceeding upon the assumption of such a common-law principle, which is beyond the power of the state to repeal, the fact seems not to have been considered that the *unconditional* liability created by the first section excludes that form of assumption of risk which at common law operates as a bar to recovery when the injury results "in whole or *in part* from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment."

Before proceeding to a technical construction of the act or attempting to show that the fourth section, instead of giving rise to a defense in favor of the carrier, in fact extends the liability created by the first section, let us consider the anomalous character of the act with this doctrine of the common law construed into it.

The decision in *Seaboard Air Line R.* v. *Horton*, imputes to Congress the purpose of imposing the highest degree of liability for failure to comply with statutes enacted for the safety of employees, and, at the same time, of affording immunity to the highest degree of negligence of which the carrier can be guilty with respect to all other instrumentalities not covered by such statutes.

Can any reason be given why Congress should have intended thus to discriminate between such appliances as driving-wheel brakes, automatic couplers, grab-irons, drawbars, running-boards, steps and locomotive ash-pans, on the one hand, and bridges, trestles, roadbeds, tracks, ties, machinery, works, boats, wharves, and all other kinds of appliances and equipment, on the other? Can any reason be conceived why Congress, for the purpose of promoting the safety of employees or advancing interstate commerce, should have imposed absolute liability for the failure to equip cars and engines with the statutory appliances, not to be affected by the employee's knowledge of the omission nor to be mitigated by his contributory negligence, and yet,

with respect to all other instrumentalities, have given to the carrier the benefit of the common-law defense of assumption of risk with the encouragement to negligence which that defense affords?

The explanation of the provision of the third section, forbidding the defense of contributory negligence even in mitigation of damages, and of the fourth section, forbidding the defense that the risk was one of the assumed "risks of his employment," when the injury to the employee results from the violation of a statute, is that Congress intended to compel compliance with its statutes by forbidding any defense in case of their violation. But, since it is impracticable to regulate by statute the whole matter of the construction, equipment and maintenance of an interstate railway, to the extent that the character and condition of the equipment are not, and in the nature of things can not be, prescribed by statute, the existence of any "defect or insufficiency" due to the carrier's negligence, from which injury to its employee results in whole or in part, is made the conclusive test of liability.

When such a defect or insufficiency and its causal relation to the injury are shown, the liability is absolute and subject only to mitigation to the extent, to be determined by the jury, that the injury is attributable to the employee's contributory negligence. *Baltimore & O. R. Co.* v. *Darr*, 124 C. C. A. 565; *Grand Trunk R. Co.* v. *Lindsay*, 120 C. C. A. 166; *Wright* v. *Yazoo, etc., R. Co.*, 197 Fed. 94; *Illinois Central R. Co.* v. *Nelson*, 122 C. C. A. 258; *St. Louis, etc., Co.* v. *Conley*, 187 Fed. 949; *Philadelphia, etc., R. Co.* v. *Tucker*, 35 App. D. C. 123; charge of Judge McPherson in *Pedersen* v. *Delaware &c. R. Co.*, 229 U. S. 149; *Thornton* v. *Seaboard A. L. Ry.*, 82 S. E. 433.

In *Seaboard Air Line R.* v. *Horton*, the following distinction is drawn between "contributory negligence," which the act provides shall not bar recovery, and "assumption of risk," which the decision holds may bar recovery:

> "Contributory negligence involves the notion of some fault or breach of duty on the part of the employee. * * * On the other hand, the assumption of risk, even though the risk be obvious, may be free from any suggestion of fault or negligence on the part of the employee."

Can any reason be given why Congress should have intended to forbid recovery to an employee guilty of no fault, and yet allow recovery to an employee guilty of fault or breach of duty—why Congress should have intended to forbid recovery to the employee guilty of no negligence and yet allow recovery to the employee guilty of contributory negligence—which implies that he was chargeable with the same *knowledge* of the danger which resulted in the injury? Or can any reason be given why Congress should have intended to forbid recovery to an employee for merely remaining in the service with knowledge and without complaint, and yet allow recovery to an employee who, with the same *knowledge*, expressly and for valuable consideration *contracts* to exempt the carrier from liability?

Besides the policy of the act and the ground of its constitutionality declared in *Mondou* v. *N. Y., etc., R. Co.*, already quoted, we have the following statement in *Pedersen* v. *Delaware, etc., R. Co.*, 229 U. S. 149:

> "Indeed, the statute now before us proceeds upon the theory that the carrier is charged with the duty of exercising appropriate care to prevent or correct 'any defect or insufficiency * * * in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.'"

Is it conceivable that the policy of the act, as thus twice declared by the court, could be more effectually defeated than by introducing into it the common law defense of

assumption of risk as to all dangers arising from defects and insufficiencies, except from violations of statutes? This defense encourages negligence. As observed by Judge Jaggard in *Rase* v. *Minneapolis, etc., Co.*, 120 N. W. 360, 21 L. R. A. n. s. 138-146:

> "The reasoning by which it is sought to be justified, carried to its logical conclusion, tends to result in this paradox: The more grossly the master is negligent, the more certain is the assumption of risk by the servant, and the master's exoneration. If the master be more careful, then the more doubtful is the servant's assumption of risk, and the more probable is the master's liability. The employer who is successfully careful and he who is extremely careless are equally protected. The exercise of care is discouraged, and a premium is put on negligence."

The doctrine of assumption of risk which thus gives immunity to the employer's negligence and compels the servant, as a last resort, to quit the service and stop the business in order to escape irremediable injury, is at variance with the ground upon which the constitutionality of the act was sustained. Such a doctrine had its origin in the relation of master and servant under conditions which affected the interests only of the employer and employee. It is an incubus upon the interstate commerce of the country with the important public interests which that commerce subserves. Under its baleful influence upon commerce, in time of peace trainmen, on becoming chargeable with knowledge of the carrier's negligence, must cease the transportation of passengers, mails and freight, and in time of war the transportation of troops as well.

The doctrine of assumption of risk originated in the case of *Priestley* v. *Fowler*, 3 Mees & W. 1. There is no more similarity between the reasons and policy upon which

that decision is based, and the reasons and policy which called for the legislation embodied in the Employers' Liability Act, than there is between a "butcher's van" and the physical equipment of an American trans-continental railway.

It is inconceivable that Congress should have intended to fetter the interstate commerce of the present day with the crude doctrines laid down by Lord Abinger in *Priestley* v. *Fowler*, which involved the question of liability of a butcher for injury to his servant resulting from an overloaded "butcher's van"—doctrines against which many of the courts have protested and the injustice of which, in their application to modern industrial conditions, has brought forth the various acts of remedial legislation in all the countries in which the common law of England has prevailed.

The interstate carriers of the United States are public service corporations. The commerce in which they are engaged and the instrumentalities by which that commerce is carried on were not conceived of at the time of *Priestley* v. *Fowler*. On that commerce depend the wealth, the happiness and the civilization of the country. Employees of interstate carriers are indispensable instrumentalities or agencies in that commerce. The commerce must go on. Employees can not stop.

To free commerce from the fetters of the common law—"to impel the carrier to avoid or prevent the negligent acts and omissions which are made the bases of the rights of recovery which the statute creates and defines," and thereby "to promote the safety of the employees and to advance the commerce in which they are engaged"—was the enlightened purpose of the act and the constitutional justification for this exertion of congressional power. *Mondou* v. *New York, etc., R. Co., supra.*

Senator Dolliver, discussing upon the floor of the Senate the Act of April 22, 1908, said:

> "The public policy which we now declare is based upon the failure of the common law to meet the modern industrial conditions."

Senator Borah, advocating the amendment of April 5, 1910, declared that:

> "It was the intention of Congress in the enactment of this law originally, and it may be presumed to be the intention of the present Congress, to shift the burden of loss resulting from these casualties from 'those less able to bear it' and place it upon those who can, as the Supreme Court said in the *Taylor Case*, 210 U. S. 281, 'measurably control their causes.' * * * The passage of the original act and the perfection thereof by the amendment herein proposed stand forth as a declaration of public policy to radically change, so far as congressional power can extend, those rules of the common law which the President in a recent speech at Chicago characterized as 'unjust.'" See also Doherty on Emp. Liability Act, 61.

THERE IS NO COMMON LAW OF THE UNITED STATES.

Before the enactment of this statute there was no Federal law of negligence. The Federal courts in the exercise of their jurisdiction in cases involving liability of railway companies to their employees, whether engaged or not in interstate commerce, applied the law of negligence as a part of the law of the state where the injury was occasioned. This statute, for the first time, creates a substantive Federal right in favor of the employee, distinct from the right theretofore given him by the law of the state. Thornton on Fed. Employers' Liability Act, sec. 1, pp. 4-5, note.

The system of Federal liability created by the act is exclusive of the law of the states upon the subject, which means that it is exclusive of the grounds of liability available to the employee under the state law, whether common law or statutory, and of the grounds of defense, whether common law or statutory, afforded by the law of the state to the interstate carrier. Just as the employee must look to the act for his cause of action, so the carrier must look to the act for its defenses. Unlike the liability under the law of the state, which originated in the common law and was subject to all the defenses available at common law, the system of Federal liability is purely of statutory creation. The terms in which liability is imposed are exclusive of defenses which would defeat that liability.

There is no common law of the United States, except that in the construction of the constitution and acts of Congress recourse may be had to the common law for the purpose of interpreting the technical terms employed, which otherwise would be unintelligible. *Wheaton* v. *Peters,* 8 Peters, 658; *Pennsylvania* v. *Wheeling,* 13 How. 563; *Smith* v. *Alabama,* 124 U. S. 465-83; *Moore* v. *United States,* 91 U. S. 279; *Gatton* v. *Chicago,* 28 L. R. A. 556.

The common law is essentially the law of the states. It exists as a part of the law of the states by virtue of its adoption by the states, and to the extent only that it is not in conflict with state institutions and is not repealed by state legislation. Although, when the question is one of general and not merely of local jurisprudence, the Federal courts will apply their own construction of the common law, irrespective of the decisions of the state courts, they nevertheless do so in administering the common law as the law of the states. *Smith* v. *Alabama, supra.*

The common law exists as a part of the law of Virginia by virtue only of express legislative adoption. Ordinance of Convention 1776, 9 Hen. St. 127, 13 Id. 23; Act Dec. 27, 1792; 1 Minor's Institutes, ed. 1891, 50-1. The original

enactments are now embodied in section 2 of the Code of Virginia, which is as follows:

> "The common law of England, so far as it is not repugnant to the Bill of Rights and Constitution of this state, shall continue in force within the same, and be the rule of decision, except in those respects wherein it is or shall be altered by the General Assembly."

Assumption of risk has been abolished in Virginia as to railroad employees by constitutional provision[1] as well as by statute.[2] *Norfolk & W. R. Co.* v. *Cheatwood,* 103 Va. 336.

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[1] Section 162 of the Constitution of the State is as follows:

"The doctrine of fellow-servant, so far as it affects the liability of the master for injuries to his servant resulting from the acts or omissions of any other servant or servants of the common master, is, to the extent hereinafter stated, abolished as to every employee of a railroad company, engaged in the physical construction, repair or maintenance of its roadway, track or any of the structures connected therewith, or in any work in or upon a car or engine standing upon a track, or in the physical operation of a train, car, engine or switch, or in any service requiring his presence upon a train, car or engine; and every such employee shall have the same right to recover for every injury suffered by him from the acts or omissions of any other employee or employees of the common master, that a servant would have (at the time when this Constitution goes into effect), if such acts or omissions were those of the master himself in the performance of a non-assignable duty: provided, that the injury, so suffered by such railroad employee, result from the negligence of an officer, or agent, of the company of a higher grade of service than himself, or from that of a person, employed by the company, having the right, or charged with the duty, to control or direct the general services or the immediate work of the party injured, or the general services or the immediate

In states which have repealed the common law defense of assumption of risk (*Hough* v. *Texas P. R. Co.*, 100 U. S. 612), the defense can not be set up as a bar to recovery in any case whether arising under the Act of Congress or out of purely intrastate service. In cases arising under the Act of Congress in states where this defense has not been abolished, the defense is not available, for the reason that the act can not be "pieced out" by the law of the state. In other words, if the Act of Congress can not, as is universally conceded, be "pieced out" by legislation of the states repealing the common-law defense, how can it be "pieced out" by state legislation originally adopting the common law, or by this principle of the common law after it has been repealed by the states? In *W. U. Tel. Co.* v. *Commercial Milling Co.*, 218 U. S. 406, Mr. Justice McKenna said:

> "We have seen that one division of the Supreme Court of the state was of the view that if the pro-

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work of the co-employee through, or by, whose act or omission he is injured; or that it result from the negligence of a co-employee engaged in another department of labor, or engaged upon, or in charge of, any car upon which, or upon the train of which it is a part, the injured employee is not at the time of receiving the injury, or who is in charge of any switch, signal point, or locomotive engine, or is charged with dispatching trains or transmitting telegraphic or telephonic orders therefor; and whether such negligence be in the performance of an assignable or non-assignable duty. The physical construction, repair or maintenance of the roadway, track or any of the structures connected therewith, and the physical construction, repair, maintenance, cleaning or operating of trains, cars or engines, shall be regarded as different departments of labor within the meaning of this section. Knowledge, by any such railroad employee injured, of the defective or unsafe character or condition of any machinery, ways, appliances or structures, shall be no defense to an action for injury caused thereby.

hibition rested on the common law, its validity could not be questioned. We can not concede such effect to the common law and deny it to a statute. Both are rules of conduct proceeding from the supreme power of the state. That one is unwritten and the other written can make no difference in their validity or effect. The common law did not become a part of the laws of the states of its own vigor. It has been adopted by constitutional provision, by statutes or decision, and, we may say in passing, is not the same in all particulars in all the states. But however adopted, it expresses the policy of the state for the time being only, and is subject to change by the power that adopted it. How, then, can it have an efficacy that the statute changing it does not possess?"

From the nature of legislation by Congress, in the exercise of its power to regulate commerce, such legislation is exclusive of the law of the states. The defenses permis-

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When death, whether instantaneous or not, results to such an employee from any injury for which he could have recovered, under the above provisions, had death not occurred, then his legal or personal representative, surviving consort, and relatives (and any trustee, curator, committee or guardian of such consort or relatives) shall, respectively, have the same rights and remedies with respect thereto as if his death had been caused by the negligence of a co-employee while in the performance, as vice-principal, of a non-assignable duty of the master. Every contract or agreement, express or implied, made by an employee, to waive the benefit of this section, shall be null and void. This section shall not be construed to deprive any employee or his legal or personal representative, surviving consort or relatives (or any trustee, curator, committee or guardian of such consort or relatives) of any rights or remedies that he or they may have by the law of the land, at the time this Constitution goes into effect. Nothing contained in this section shall restrict the power of the General Assembly

sible under the act must be found in the express or implied provisions of the act. The question, therefore, is not whether the common-law defense of assumption of risk, *as such*, is available to the carrier; but whether it appears from the terms of the act that Congress intended to *create*, in favor of the carrier, a defense similar to that of common-law assumption of risk of the *carrier's negligence*.

CONSTRUCTION OF THE ACT.

The object of the statute was to create in favor of the employee of a common carrier coming within its purview absolute liability for injury resulting *"in whole or in part"* from its *negligence* with respect to its *physical* instrumentalities, represented by its "cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment," or from the negligence of its *human* agencies represented by its "officers, agents or employees;" and to make it negligence *per se* for such carrier to violate "any

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to further enlarge, for the above-named class of employees, the rights and remedies hereinbefore provided, or to extend such rights and remedies to, or otherwise enlarge the present rights and remedies of, any other class of employees of railroads or of employees of any person, firm or corporation."

[2]The statute of the State (Acts of Assembly 1901-2, chapter 322, p. 335, 1 Pollard's Code 1904, sec. 1294-k), is as follows:

"1. Be it enacted by the General Assembly of Virginia, That every corporation operating a railroad in this state, whether such corporation be created under the laws of this state or otherwise, shall be liable in damages for any and all injury sustained by any employee of such corporation as follows: When such injury results from the wrongful act, neglect, or default of an agent or officer of such cor-

statute enacted for the safety of employees." As a corporation can act only through its officers, agents or employees, such "defects or insufficiencies" as may occur in its physical appliances will necessarily be attributable to its human agencies. The two grounds of liability will therefore overlap each other.

The purpose of Congress to create unconditional liability when the injury results "in whole or *in part*" from such *negligence*, is manifest from the provisions of the third and fifth sections, "that the fact that the employee may have been guilty of contributory negligence shall not bar a recovery," and "that any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall, to that extent, be void."

The provisions of the third section, "that no such employee who may be injured * * * shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted

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poration superior to the employee injured, or of a person employed by such corporation having the right to control or direct the services of such employee injured, or the services of the employee by whom he is injured; and also when such injury results from the wrongful act, neglect, or default of a co-employee engaged in another department of labor from that of the employee injured, or of a co-employee on another train of cars, or of a co-employee who has charge of any switch, signal point, or locomotive engine, or who is charged with dispatching trains or transmitting telegraphic or telephonic orders. Knowledge by any employee injured of the defective or unsafe character or condition of any machinery, ways, appliances, or structures of such corporation shall not of itself be a bar to recovery for any injury or death caused thereby. When death, whether instantaneous or otherwise, results from any injury to any employee of such corporation received as aforesaid, the personal representative of such employee shall have a right of action therefor against such corporation, and may re-

for the safety of employees, contributed to the injury," and of the fourth section, "that in any action brought against any common carrier under or by virtue of any of the provisions of this act, to recover damages for injuries to * * * any of its employees, such employee shall not be held to have assumed the *risks of his employment* in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury," indicate the determination of Congress to enforce the requirements of "statutes enacted for the safety of employees," by exempting the employee in the one case from the imputation of contributory negligence, and in the other from the defense that dangers resulting from such violation were among the "risks of his employment."

The theory that the effect of the fourth section is to adopt the common law doctrine that the employee by continuing in the service assumed the abnormal risks resulting from "defects or insufficiencies," due to the *negligence* of the carrier, unless its conduct involved also the violation of a statute enacted for the safety of employees, proceeds upon a misconstruction of the words, "risks of his employment," and an inadvertent leaving out of consideration of the relation between the common law of England and legislation by Congress in the United States.

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cover damages in respect thereof. Any contract or agreement, express or implied, made by any such employee to waive the benefit of this section or any part thereof shall be null and void, and this section shall not be construed to deprive any such employee, or his personal representative, of any right or remedy to which he is now entitled under the laws of this state.

"2. The rules and principles of law as to contributory negligence, which apply to other cases, shall apply to cases arising under this act, except in so far as the same are herein modified or changed.

"3. This act shall be in force from its passage."

The words of the fourth section, "risks of his employment," mean the ordinary risks inherent in the business—the unavoidable risks which are intrinsic notwithstanding the performance by the carrier of its personal duties. They do not include the "secondary and ulterior" risks arising from abnormal dangers due to the employer's negligence.

The object of this section was not to adopt by *implication* the common-law defense of assumption of the risk of such abnormal dangers. Its object was in *express terms* to exclude the defense which, before the passage of the act, was available to the carrier in determining what are the "risks of his employment" assumed by the employee.

Before the enactment of this statute, the carrier might exempt itself from liability under the common-law doctrine of the "choice of methods." The common-law duty of the master was only to exercise ordinary care to provide the servant with reasonably safe appliances. He was not required to use any particular appliance. Independently of the safety appliance act, the selection by the master of his appliances was a choice in which the courts would not undertake to control his discretion; it was not incumbent upon him to choose this or that specific appliance, but only to exercise ordinary care to provide reasonably safe appliances.

When it is considered that the first section imposes liability only for *negligence*, the purpose of the fourth section to extend that liability becomes apparent. The word "negligence" is a common-law term. It is therefore to be construed according to its common-law meaning. The act does not make the carrier an insurer of its employee's safety. By the first section it makes the carrier unconditionally liable for the *negligence* of its officers, agents or employees, and for its *negligence* with respect to its appliances. But, at common law, the authorities are in conflict as to whether the violation of a "statute enacted for the safety of employees" is negligence. 5 Labatt's Master & Servant (2 ed.) sec.

1909. If it was not negligence, that is, if it involved no breach of duty to the employee, the risk of injury therefrom was a "risk of his employment." To remove doubt on this point and to make the violation of such a statute negligence *per se* under the system of Federal liability, the fourth section provides that the employee "shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury."

In *Norfolk & W. R. Co.* v. *Cromer*, 101 Va. 667, the court thus states the common-law doctrine of the employer's choice of methods: "Courts and juries can not dictate to railway companies a choice between methods all of which are reasonably adequate for the purpose to be subserved;" and this doctrine has been applied to relieve the employer of civil liability even when the injury resulted from violations of safety statutes.

In *Nottage* v. *Sawmill Phoenix*, 133 Fed. 976, where the safety appliance act of Washington imposed a penalty for its non-observance, but contained no language similar to that of the fourth section of the Act of Congress, the court said:

> "This is a penal statute, enacted by the Legislature in the exercise of the police power of the state, and it contains no provision purporting to affect in any way the rules of law applicable to civil actions. It gives no hint of an intention to confer upon injured employees any new right enforceable in an action to recover damages, nor does it express a legislative intent to change the common law by abolishing defenses recognized by the common law."

In *Glenmont Lbr. Co* v. *Roy*, 126 Fed. 524, 61 C. C. A. 506, which involved a similar statute, in the opinion delivered by

Judge Sanborn, and concurred in by Judge (now Mr. Justice) Van Devanter, it is said:

> "The master is not required to supply the best, newest or safest appliances to secure the safety of his servants; nor is he bound to insure the safety of the place or of the appliances he furnishes. His duty in this respect is discharged when he has exercised ordinary care to furnish a place and appliances reasonably safe and suitable for the use of his employees. * * * The factory act of Minnesota which requires employers to guard or fence dangerous machinery so far as possible, does not abolish the defense of assumption of risk. It does not deprive parties of their right to contract regarding the risks of their avocations."

To create a system of Federal liability which would displace this defense and make the violation by an interstate carrier of statutes enacted by Congress for the safety of employees negligence *per se*, was the whole purpose and effect of the fourth section.

The Phrase "Risks of His Employment."

Let us consider more closely the significance of the words "risks of his employment." It is to be observed that the statute nowhere uses the phrase "assumption of risk." The words of the statute are "the risks of his employment," which include only the normal risks incident to the service, not enhanced by the employer's negligence. While the phrase "assumption of risk" in its modern acceptation includes the ordinary risks as well as those due to the employer's negligence, the words "risks of his employment" refer only to the ordinary risks, the existence of which implies no negligence on the part of the master.

The proposition that the servant contractually assumes the risks of his employment, says Mr. Labatt, "of course amounts merely to an assertion * * * of the general principle that proof of negligence on the master's part is a prerequisite to the establishment of the servant's right to maintain an action." 5 Labatt's M. & S. (2d ed.), sec. 1647.

> "A proposition which has so frequently been enunciated by the courts as to have become axiomatic is that, *prima facie*, a servant does not assume any risk which may be obviated by the exercise of reasonable care on the master's part. In other words, the abnormal, unusual or extraordinary risks which the servant does not assume as being incident to the work undertaken by him are those which would not have existed if the master had fulfilled his contractual duties." 3 Labatt's M. & S. (2d ed.), sec. 894.

The English rule is thus stated by Blackburn, J., in *Morgan* v. *Vale of Neath R. R. Co.*, 5 Best. & S. 570, 35 L. J. Q. B. n. s. 260, affirmed in L. R. 1 Q. B. 149:

> "If the master has, by his own personal negligence or malfeasance, enhanced the risk to which the servant is exposed, beyond those natural *risks of the employment* which must be presumed to have been in contemplation when the employment was accepted—as, for instance, by knowingly employing incompetent servants, or supplying defective machinery, or the like—no defense founded on this principle can apply; for the servant does not, as an implied part of his contract, take upon himself any other risks than those naturally incident to the employment." (Italics ours.)

In *Texas Pac. R. Co.* v. *Harvey*, 228 U. S. 319-21, it is said:

> "At the common law the servant assumes the ordinary *risks of his employment*, but he is not obliged to pass upon the methods chosen by his employer in discharge of the latter's duty to provide suitable appliances and a safe place to work, and he does not assume the risk of his employer's negligence in performing such duty." (Italics ours.)
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> "*Risks of employment* assumed are those which occur after the master has done what the law enjoins." *Howard* v. *Delaware, etc., R. Co.*, 6 L. R. A. 75; note. (Italics ours.)

THE MAXIM "EXPRESSIO UNIUS EXCLUSIO EST ALTERIUS."

If full force be given to the maxim, "*expressio unius exclusio est alterius*," as applied to the words of the fourth section, "such employee shall not be held to have assumed the *risks of his employment* in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee," what would be the effect of the maxim? It would be that those "*risks of his employment*" which do not result from the violation of a statute enacted for his safety would remain as the "risks of his employment," which under the act are still assumed, and the existence of which would not imply negligence on the part of the employer.

The words "risks of his employment" have a definite meaning distinct from the enhanced risks "due to the employer's negligence." An application of the maxim to one risk of the first class would certainly not justify the implication of risks of the second class.

The change of phraseology, alluded to in some of the cases, from "violation of law by such common carrier" contained, in the original draft of the bill, to the words "the violation by such common carrier of any statute enacted for the safety of employees," adopted on the passage of the act, is of no significance. The reason for the change was that the expression "the violation of law" was too vague. That expression might have embraced every local law of any state or territory within the jurisdiction of the United States. Congress was unwilling to employ so indefinite an expression. Its purpose was to ordain in a consistent act of legislation a single standard of liability, and to adopt therefor only such law as emanated from Congress; and, inasmuch as no law emanates from Congress but *statutes*, the language was properly changed to "statutes enacted for the safety of employees."

The Phrase "Assumption of Risk."

Courts which hold that the common-law defense of "assumption of risk" is available under the act to bar recovery when the injury is attributable to the employer's negligence, have fallen into the error, partly at least, by failing to distinguish between the significance of this phrase and the more restrictive words of the statute, "risks of his employment."

The phrase "assumption of risk," in its original significance embraced only such risks as were inherent, or at least involved no breach of common-law duty. In this sense, the risks included are synonymous with those embraced in the phrase "risks of his employment." In its secondary application the phrase, "assumption of risk," was extended to embrace the *enhanced* risks due to the employer's negligence, and thus was made to include two legal conceptions essentially different.

In its original sense, assumption of risk was a bar to recovery because, there being no breach of common-law duty, there could be no cause of action; while in its secondary sense the negligence of the employer gave rise to a cause of action which might be defeated by proof of the employee's continuance in the service with knowledge of the enhanced danger. The essentially different characters of the two defenses covered by the common-law phrase "assumption of risk" are clearly shown in the note to *Scheurer* v. *Banner Rubber Co.*, 28 L. R. A. n. s. 1221:

> "Assumption of risk, as applied to the ordinary risks of the service, is merely a rhetorical phrase used to connote the idea that the master is not an insurer against injuries resulting from dangers which can not be removed by the exercise of due care upon his part. In the second sense, assumption of risk has a vastly different significance; it implies negligence on the part of the master and a *prima facie* liability, but it also implies a waiver of the effects of that negligence if it injures the servant."

"Assumption of risk" in the sense "that proof of negligence on the master's part is prerequisite to the establishment of the servant's right to maintain an action," except as modified by the act, is an available defense; but "assumption of risk" in its secondary sense, as an "implied agreement," or a voluntary exposure to danger implied in the maxim *"volenti non fit injuria,"* upon which the employer may rely to exonerate itself from liability for an injury resulting from a "defect or insufficiency" due to its own negligence, or as a form of contributory negligence with respect to such defect or insufficiency, is not an available defense under the act.

Assumption of risk, as a defense in its original sense, is *restricted* by the fourth section, which strikes from the category of "risks of employment" the violation by the car-

rier of "any statute enacted for the safety of employees." Assumption of risk, as a defense in its secondary sense, is *excluded* by the first section when the injury results "in whole or in part" from the negligence of the carrier or any of its officers, agents or employees. It is also *prohibited* by the fifth section.

Differences Between Common-Law and Federal Systems of Liability.

The differences between the common-law and Federal systems of liability may be more clearly presented by a comparative statement of the common-law doctrines and the statutory provisions creating the Federal liability.

1. At common law, the initial defense open to the employer was that the injury was not due to any negligence for which it was responsible, that is, that the injury did not result from the breach of any duty which it owed to the employee, but resulted from an inherent danger of the business, or *wholly* from some fault of the employee.

If the injury resulted from a danger inherent in the business, such danger was, by the implied terms of the contract of service, assumed by the employee as a "risk of his employment," and among the risks so assumed was the danger of injury from the negligence of his fellow-servant, and, according to numerous decisions, the violation by the master of "statutes enacted for the safety of employees."

The act admits in favor of the carrier these two defenses in bar of the action: (a) that the injury was due wholly to some fault of the employee; and (b) that the injury was due to a "risk of his employment," except to the extent that the latter defense is modified by the first and fourth sections of the act. The modifications are: (a) that the defense of fellow-service is displaced by the first section; and (b) that the violation "of any statute enacted for the safety of employees," which did not at common law neces-

sarily give rise to civil liability, is made negligence *per se* by the fourth section.

These are the only defenses in bar of the action, and they are open to the carrier not because they are common-law defenses and, *as such*, may be set up, but because they are defenses which are necessarily to be implied from the terms of the act. The act excludes all defenses in bar of recovery when the injury results "in whole or in part" from the negligence of the carrier or its officers, agents or employees.

2. At common law, although the injury resulted from a *"defect or insufficiency"* in physical appliances admittedly *"due to the negligence"* of the employer, there could be no recovery if the employee continued in the service without complaint after becoming chargeable with knowledge of the danger arising from such defect or insufficiency.

This form of "assumption of risk" is not available under the act. The terms in which liability is imposed exclude this defense. The liability is unconditional. Congress did not employ the language, "shall be liable in damages, *subject to the common-law defense of assumption of risk;*" and without language expressly or by implication adopting this defense it can not be invoked as a bar to recovery.

3. At common law there could be no recovery for an injury resulting from the negligence of a fellow-servant, the risk of injury from that cause being one which the employee was, by the implied terms of his contract, held to have assumed as a "risk of his employment."

Likewise, the terms in which liability is imposed exclude this defense. The liability is unconditional. Congress did not employ the language, "shall be liable in damages, *subject to the common-law defense of fellow-service.*" It is therefore generally conceded that the defense of fellow-service is not available under the act. It should be observed, however, that the reason for the exclusion of this defense is, not that Congress was repealing the common-law, but that in the exercise of its independent power it saw fit to

make the principle, "*respondeat superior*" a part of the system of Federal liability as to all classes of "officers, agents and employees."

4. At common law, although the injury resulted *in part* from a "defect or insufficiency" due to the employer's negligence, there could be no recovery unless such defect or insufficiency was the *proximate* cause of the injury, without the intervention of any other efficient cause for which the employer was not responsible.

The terms in which liability is imposed exclude this defense, the first section creating unconditional liability when the injury results "in whole or *in part*" from the negligence of the carrier or any of its officers, agents or employees. To entitle the employee to recover it is not necessary that such negligence should be the sole or even the proximate cause; it is sufficient if it is in the line of causation.

> "It is only when plaintiff's act is the sole cause—when defendant's act is no part of the causation—that defendant is free from liability under the act." *Grand Trunk R. Co.* v. *Lindsay*, 120 C. C. A. 166-73, affirmed 233 U. S. 42.

5. At common law, although the injury resulted from a "defect or insufficiency due to the negligence of the employer, or from the negligence of any of its officers, agents or employees, occupying the relation of vice-principal, there could be no recovery if the employee by his own negligence proximately contributed to the injury.

Under the third section, "the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

6. At common law also when the employer's liability might not be otherwise evaded, recovery might still be de-

feated by proof of a contract, entered into by the employee, exempting the employer from liability. *Griffiths* v. *The Earl of Dudley*, 9 Q. B. Div. 357.

This defense is not available under the act, the fifth section expressly providing "that any contract, rule, regulation, or device whatsoever, the purpose or intent of which is to enable any common carrier to exempt itself from any liability created by this act, shall, to that extent, be void."

Assumption of Risk Nullifies the Specific Provisions of Act.

The act, when given what seems its proper construction, becomes what its distinguished authorship entitles it to be—a perfect specimen of constructive legislation; while the introduction into its remedial provisions of this incongruous doctrine of the common law, renders it altogether unintelligible.

(1) Assumption of risk in its secondary sense, as a common-law defense in bar of recovery when the employee was chargeable with knowledge of the employer's negligence, nullifies the first section of the act, to the extent that that section imposes liability for injury resulting "*in part*" from "any defect or insufficiency" due to the negligence of the carrier.

Congress realized that a variety of other causes might operate more or less directly in the production of an injury, such as the employee's continuance in the service with knowledge of the danger or his contributory negligence with respect to the danger. To avoid escape upon these or other grounds the act imposes unconditional liability for an injury resulting in whole or *in part* from such defect or insufficiency.

(2) This defense nullifies the first section of the act to the extent that the language, "shall be liable * * * for such injury * * * resulting in whole or in part

from the negligence of any of the officers, agents, or employees of such carrier," has been regarded as "displacing" the common-law defense of assumption of risk of the negligence of the fellow-servant.

If assumption of risk is displaced only in cases involving the violation of "statutes enacted for the safety of employees," why is not the common-law defense of the employee's assumption of the risk of injury from the negligence of his fellow-servant still available? The negligence of a fellow-servant is not the violation of "any statute enacted for the safety of employees," unless the liability act is itself such a statute (*Philadelphia B. & W. R. Co.* v. *Tucker*, 35 App. D. C. 123, 220 U. S. 608, 55 L. ed. 607). How, then, is this form of assumption of risk excluded while assumption of risk of the carrier's negligence with respect to its instrumentalities is not excluded? Is it because the defense of the fellow-servant is not a part of the defense of assumption of risk?

> "An early, if not the earliest application of the phrase 'assumption of the risk' was the establishment of the exception to the liability of a master for the negligence of a servant when the person injured was a fellow-servant of the negligent man." *Schlemmer* v. *Buffalo, etc., R. Co.*, 205 U. S. 1; *Farwell* v. *Boston, etc., Corp.* 4 Met. 499.

Courts which hold that assumption of risk is a bar to recovery for injury resulting from a "defect or insufficiency" due to the carrier's negligence, concede that assumption of risk can not be invoked to defeat recovery for injury resulting from the negligence of a fellow-servant. And why not? The liability for both kinds of negligence is imposed by the same language; both must stand or fall together. But for the unconditional liability imposed by the first section for both forms of negligence, there would be

stronger reason for holding that assumption of risk might be invoked, under the fourth section, to defeat recovery for the negligence of the fellow-servant than for the negligence of the carrier. The risk of injury from the negligence of the fellow-servant is a "risk of his employment," which at common law is assumed by the employee (*Norfolk & W. R. Co.* v. *Nuchols*, 91 Va. 193), while the risk of injury from the employer's negligence, whatever may be the basis of its assumption at common law, is not a "risk of his employment" assumed by the employee. 3 Labatt on M. & S. 2d. ed. 894.

(3) This defense nullifies the third section of the act. It is impossible to reconcile the common-law doctrine that the employee's continuance in the service with knowledge of the risk resulting from a "defect or insufficiency" is a bar to recovery, with the peremptory provision of the third section that "in all actions hereafter brought against any such common carrier * * * the fact that the employee may have been guilty of contributory negligence shall not bar a recovery."

If the preliminary conduct of continuing in the service with knowledge of the danger is to operate *in limine*, under the name of "assumption of risk," as a bar to recovery, it is obvious that little or no effect can be given to the third section. Continuance in the service with knowledge of the danger is the *common* and *essential* factor of both assumption of risk and contributory negligence, whether the negligence be of the kind which is inferable from the fact alone of such continuance in the service, or of the kind described by Judge Taft as "that action or non-action in disregard of personal safety by one who, treating the *known danger* as a condition, acts with respect to it without due care of its consequences." *Narramore* v. *Cleveland, etc., Co.*, 96 Fed. 298, 304, 37 C. C. A. 505, 48 L. R. A. 68, 77.

Can the employee's knowledge of the danger be at once a bar to recovery when considered as an element of "as-

sumption of risk" and not a bar to recovery when considered as an element of "contributory negligence?" Is it conceivable that such an anomalous state of the law was intended by Congress—that Congress intended to preserve against contributory negligence the right of action which it created, only to have that right of action defeated by "knowledge," one of the elements of contributory negligence, called by the name of "assumption of risk?"

The confusion in efforts to distinguish between "assumption of risk" and "contributory negligence" results from a lack of classification of the different phases of the two defenses, which are sought to be contrasted or defined. Such a classification demonstrates the impossibility of reconciling with the third section that form of assumption of risk which at common law bars recovery when the employee continues in service with knowledge of an *abnormal danger superadded by the master's negligence.*

Assumption of risk rests upon the *contract*, contributory negligence upon the *conduct*, of the employee. There are two forms of assumption of risk and two forms of contributory negligence:

(a) Assumption of risk of the first kind is the implied term of the contract of service by which the employee is held to assume the *ordinary* risks of the employment.

Since the existence of risks of this character does not charge the employer with negligence and their assumption does not charge the employee with contributory negligence, this form of the doctrine need not be considered further than to observe that in many of the cases—such as those cited in *St. Louis Cordage Co.* v. *Miller*, 126 Fed. 495, 63 L. R. A. 551, and *Narramore* v. *Cleveland, etc., R. Co.*, 96 Fed. 278, 37 C. C. A. 499, 48 L. R. A. 68, as illustrative of the proposition that persons of ordinary prudence frequently engage in dangerous employments—the dangers were those ordinarily incident to the business, for injuries resulting

from which there is no liability either at common law or under the Act of Congress.

(b) Assumption of risk of the second kind is the implied contract by which the employee, who continues in service with knowledge of an *enhanced risk due to the employer's negligence,* is held to have assumed the additional hazards.

> "A servant who, either before or after he commences the performance of the contract of employment, has ascertained * * * that the ordinary hazards of his environment have been augmented by abnormal conditions produced by the negligence of his master * * * and has accepted or continued in the employment without making any objection and without receiving any promise that the abnormal conditions will be remedied, is deemed, as a matter of law, to have assumed the risk thus superadded." 3 Labatt on M. & S. (2d. ed.), sec. 1182.

(a) Contributory negligence of the first kind is the failure to exercise due care for his own safety which is inferred from the conduct of the servant in merely continuing in the service with knowledge of an enhanced danger due to the employer's negligence. 3 Labbatt's M. & S. (2d. ed.), secs. 1205, *et seq.*

> "In the absence of some special element which suggests a sufficient excuse for his conduct, a servant is chargeable, as a matter of law, with contributory negligence if he goes on working after he has ascertained that an extraordinary risk, creating an ever-present possibility of injury, has been superadded to the incidents of his employment." 3 Labatt's M. & S. (2d ed.), sec. 1210.

(b) Contributory negligence of the second kind is some act or omission on the part of the employee proximately contributing to the injury, which evinces a want of care for his own safety in the presence of such enhanced danger. It is that form of negligence which involves the notion of some immediate fault or breach of duty. 3 Labatt's M. & S. (2d ed.), ch. 52, secs. 1226, *et seq.*

This form of contributory negligence is predicable of the conduct of the servant only when he "was aware of the conditions which caused his injury and understood the danger created by those conditions." 3 Labatt's M. & S. (2d. ed.), secs. 1233-34.

Explications are inadequate which place in contrast only the first form of assumption of risk and the second form of contributory negligence. Apart from the element of the "implied contract" there is nothing to distinguish assumption of risk of the second kind from contributory negligence of the first kind. 3 Labatt's M. & S. (2d ed.), sec. 1219. Indeed, that form of assumption of risk and both forms of contributory negligence, *when viewed with reference to the actual conduct of the employee,* are so inextricably related that it is impracticable to discover the point at which the employee's "knowledge" as a bar to recovery, when considered as an element of assumption of risk, shall cease to be a bar to recovery when considered as an element of contributory negligence.

Such definitions as, "assumption of risk is the voluntary contract of an ordinarily prudent servant to take the chances of the known or obvious dangers of his employment," *St. Louis Cordage Co.* v. *Miller, supra,* and "assumption of risk * * * is the acquiescence of an ordinarily prudent man in a known danger, the risk of which he assumes by contract," *Narramore* v. *Cleveland, etc., R. Co., supra,* are too narrow. They are correct only when the dangers assumed are the ordinary dangers of the employment. They are not correct when the dangers are those arising from

the employer's negligence. It is a contradiction in terms to say that assumption of risk is the contract of an ordinarily *prudent* man, when the dangers are such that his *conduct* in performing the *contract* charges him with contributory negligence.

Further quotations from the two cases just cited show the inadequacy of these and similar definitions:

> "The truth is that * * * assumption of risk and contributory negligence both apply to prevent recovery in cases in which the servant has knowingly and willingly exposed himself to dangers too imminent for prudent persons to incur." *St. Louis Cordage Co.* v. *Miller,* 126 Fed. 495, 502.
>
> "Assumption of risk and contributory negligence approximate where the danger is so obvious and imminent that no ordinarily prudent man would assume the risk therefrom." *Narramore* v. *Cleveland, etc., R. Co.,* 48 L. R. A. 68, 77, 37 C. C. A. 505, 96 Fed. 304.

In *Clark Lumber Co.* v. *Johns,* 98 Ark. 211, 217, a court which enforces the distinction in all its common-law rigor, thus states the proposition:

> "Where the servant is aware of the defect, and the danger is so imminent and obvious that a person of ordinary prudence would not continue in the work, he not only assumes the risk, but is guilty of contributory negligence. This is where the doctrine of contributory negligence and of assumed risk approximate so that they are indistinguishable."

When the two defenses thus approximate and become indistinguishable, which is to prevail, the third section of the Act of Congress or the English common-law doctrine

of assumption of risk? This approximation occurs not only when the danger is imminent, but also whenever an abnormal danger is present to such an extent as to charge the servant with assumption of risk or contributory negligence, either as a *matter of law* or as a *matter of fact*. *Northern P. R. Co.* v. *Mares*, 123 U. S. 710-720; *Kane* v. *Northern C. R. Co.*, 128 U. S. 91; Shear & Red. on Neg., sec. 211; *Francis* v. *Kansas City, etc., R. Co.*, 127 Mo. 658; 26 Cyc. 1211; *Massur-Sauntry, etc., Co.* v. *Brown*, 61 C. C. A. 207; *Southern P. R. Co.* v. *Yeargin*, 48 C. C. A. 497, 109 Fed. 436; *Graham* v. *Newberry, etc., Coal Co.*, 38 W. Va. 272, 18 S. E. 584; *Chicago &c. R. Co.* v. *Crotty*, 141 Fed. 913, 4 L. R. A. n. s. 832.

"Whenever the evidence," says Mr. Labatt, in stating the common-law rule, "suggests that the servant knew of the extraordinary risk which causes the accident, the jury should be instructed regarding the legal consequences of such knowledge as justifying the inference of an assumption of the risk and of contributory negligence." 3 Labatt's M. & S. (2d ed.), sec. 1221.

Assumption of the risk of the *employer's negligence* does not differ in any essential *fact* from contributory negligence predicable of the conduct of the employee in remaining in the service with knowledge of the danger. When the negligence of the employee is augmented by some immediate misconduct, assumption of risk differs from contributory negligence in this respect only, that assumption of risk consists in *knowing the danger and acting carefully*, while contributory negligence consists in *knowing the danger and acting carelessly*. Contributory negligence, therefore, *includes*, as a part of its elements, every fact constituting assumption of risk. Apart from the "notion of contract" there can not be an assumption of risk, as a legal conception distinct from contributory negligence, which does not become merged into contributory negligence

when the conduct of the employee goes to the extent of charging him with contributory negligence.

> "Assumption of risk * * * obviously shades into negligence as commonly understood. Negligence consists in conduct which common experience or the specific knowledge of the actor shows to be so likely to produce the result complained of, under the circumstances *known* to the actor, that he is held answerable for that result, although it was not certain, intended, or foreseen. He is held to assume the risk upon the same ground. * * * Apart from the notion of contract, rather shadowy as applied to this broad form of the latter conception, the practical difference of the two ideas is in the degree of their proximity to the particular harm. The preliminary conduct of getting into the dangerous employment or relation is said to be accompanied by assumption of the risk. The act more immediately leading to a specific accident is called negligence. But the difference between the two is one of degree rather than of kind." *Schlemmer* v. *Buffalo, etc., R. Co.*, 205 U. S. 1.

Continuance in service with knowledge of the danger is *incipient* negligence. "Knowledge of the danger" is only *one* of the elements of contributory negligence (*Norfolk & W. R. Co.* v. *Cheatwood*, 103 Va. 336; *Buckner* v. *Richmond & D. R. Co.*, 72 Miss. 873). It can not, therefore, bar recovery, since "under this act, no degree of negligence on the part of the plaintiff, however gross or proximate, can as matter of law, bar recovery." *Pennsylvania, etc., Co.* v. *Cole*, 214 Fed. 948, 951; *Norfolk & W. R. Co.* v. *Earnest*, 229 U. S. 114, 57 L. ed. 1096.

So far as the two defenses "are neither identical in effect nor coincident in extent" (*St. Louis Cordage Co.* v. *Miller*),

the difference lies in the common-law implication of contract, which at the threshold bars recovery and renders unnecessary further inquiry into the employee's conduct.

Not to mention just now the incompatibility of the "notion of contract" with the fifth section of the act, this common-law defense is irreconcilable with the *unconditional* liability imposed by the first section for any injury resulting "in whole or in part" from the carrier's negligence. It is irreconcilable also with the express provision of the third section.

The liability created by the first section is absolute. Without the third section contributory negligence would have constituted *no* defense. The third section was inserted not because Congress was under the necessity of dealing with common-law doctrines, but because, in the exercise of its power wholly independent of the common law, it saw fit to give to contributory negligence, in the distinct system of Federal liability created by the act, the effect prescribed in the third section. To give to the conduct of the employee in continuing in the service with knowledge of the "defect or insufficiency" the common-law name of "assumption of risk," and under that name to make it a bar to recovery, is effectually to nullify both the first and third sections of the act.

(4) This defense, if its basis is an implied contract, renders nugatory the fifth section of the act, that "any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void."

If Mr. Labati states correctly that "the conception underlying the servant's assumption of a known risk is essentially that of an implied agreement," it is not to be reconciled with the fifth section. If Judge Putnam, in *Central Vermont R. Co.* v. *Bethune*, 206 Fed. 868, states correctly that: "There is nothing of the kind. It is merely

a practical rule of common sense, which * * * is in itself independent of the contract of service or any other contract," the distinction between assumption of risk and contributory negligence disappears.

Of the "common sense" theory suggested in the case of *Central Vermont R. Co.* v. *Bethune*, it is sufficient to observe that it is at variance with the legislative intelligence underlying all acts of remedial legislation, including the third and fourth sections of the liability act as construed by the court in that case, so far as concerns dangers resulting from the violation of statutes; and, assuming as it does that the employee *voluntarily* exposes himself to the danger of pain, maiming, and death, is at variance with every rational human instinct (*Baltimore & P. R. Co.* v. *Landrigan*, 191 U. S. 461, 474). It is at variance with the following views expressed by this court in *Butler* v. *Frazee*, 211 U. S. 459, 466, 53 L. ed. 281-5:

> "The rule of assumption of risk has been thought by many a hard one when applied to the complicated conditions of modern industry, so largely conducted by the aid of machinery propelled by irresistible and merciless mechanical power, and the criticism frequently has been made that the imperative need of employment leaves to the workmen no real freedom of choice, such as the rule assumes. That these considerations have had an influence is shown by the notorious unwillingness of juries to apply the rule, and by the legislative modifications of which, from time to time, have been made, for instance, by Congress in the safety appliance law. *Schlemmer* v. *Buffalo, etc., Co.*, 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep. 407."

The terms of the contract, by which, at common law, the servant assumes the risk of the employer's negligence—

terms to which it must conform in order to contain the requisites of mutuality and consideration—are thus explicitly stated in *St. Louis Cordage Co.* v. *Miller, supra:*

> "Since, in ordinary employments, contracts for times certain do not exist, and either party is at liberty to terminate the service at any time, there is in fact a constantly recurring daily offer and daily acceptance of the risks of the known or obvious dangers and defects of the place and of the appliance, and of the wages tendered to induce an assumption of the work and the hazards."

Interstate carriers can not, by having their employees enter into express contracts embodying the foregoing terms, evade the liability imposed by the act for injuries resulting from hazards created by their own negligence; and certainly the courts will not imply in their favor a contract which is declared void by the express provisions of the act.

The third section of the Act of 1906 (34 U. S. Stat. at L. 232, c. 3073) contained this provision:

> "That no contract of employment, insurance, relief benefit, or indemnity for injury or death entered into by or on behalf of any employee * * * shall constitute any bar or defense to any action brought to recover damages for personal injuries to or death of such employee."

In *Philadelphia, etc., R. Co.* v. *Tucker,* 35 App. D. C 123 (220 U. S. 608, 55 L. ed. 607), the court, construing this section, held that:

> "The defense of assumption of risk is removed in an action to hold a master liable for injury to an

> employee, by a statute providing that no contract of employment shall constitute any bar or defense to an action brought to recover such damages."

Meantime, in re-drafting the Act of 1908, so as to put it in its present form, Congress evidently regarded the language "no contract of employment" as too restrictive. Exemption from liability might have been secured by some other form of contract or by resort to some rule, regulation or device. To prevent this, the comprehensive language of the fifth section of the present act was adopted:

> "That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent, be void."

If Congress had not intended to include the "contract of employment" in the condemnation of the fifth section, would it have adopted the language "any contract * * * whatsoever?" Is it to be supposed that Congress intended to permit the carrier to accomplish by the "contract of employment" what it is forbidden to accomplish by "any contract, rule, regulation, or device whatsoever?"

The words "any contract * * * whatsover" necessarily include the "contract of employment." The words "any contract," in a statute, without the additional of "whatsover," include *every* contract, "whether written or verbal, express or implied." *McMurray* v. *Brown*, 91 U. S. 257, 23 L. ed. 321; *Richardson* v. *Norfolk & W. R. Co.*, 17 S. E. 195, 196, 37 W. Va. 641; *Wilson* v. *Taylor*, 8 South. 149, 89 Ala. 368; *Mornan* v. *Carroll*, 35 Iowa, 22, 26; *Sprague* v. *Haines*, 68 Tex. 215, 216, 4 S. W. 371.

The imposition by the first section of unconditional liability for any injury resulting, in whole or *in part*, from

the negligence of the interstate carrier, or its officers, agents or employees; the "displacement," by the fifth section, of *contractual* assumption of risk, under the system of Federal liability created by the act; and the introduction into that system, by the third section, of contributory negligence as a matter of mitigation only and not as a defense in bar, leave no *locus standi* for the legal *fiction* involved in the application of the ancient maxim, *volenti non fit injuria*, to the conduct of the modern employee, whose duty to himself and family as well as to the public compels him to take the risks of his employer's negligence.

The popular, the legislative and the judicial mind have all protested against the injustice of the artificial doctrine of common-law assumption of risk, whether resting on the theory of *contract* or the maxim, *volenti non fit injuria*. They have realized that neither of the theories, to which is referred the right of the employer to conduct his business with abnormally dangerous appliances and environments will bear close examination; that the only support of one is an hypothesis which represents a false and discredited view of public policy; and that the only support of the other is an hypothesis which ascribes to the word "voluntary" a meaning which is at variance with the most obvious facts. 3 Labatt on M. & S. (2d ed.), secs. 962-3-4.

The Act of Congress is the outcome of this sentiment. Its object was, by an exercise of Federal power, to free interstate commerce and its human instrumentalities from the artificial and outgrown doctrines of the common law.

> "It is the policy of the law to protect, so far as possible, those pursuing, and oftentimes necessarily pursuing, so hazardous an employment. It is enough that they must assume the intrinsic risks of their calling without compelling them to assume the negligence of their employers." *Philadelphia, etc., R. Co.* v. *Tucker*, 35 App. D. C. 123, L. R. A. 1915-C, 46.

The English Employers' Liability Act (43-44 Vict. Ch. 42) gives to the workman in the cases specified "the same right of compensation and remedies against the employer as if the workman had not been a workman, nor in the service of the employer, nor engaged in his work." In other words, it gives him only the *common-law* right of action of a stranger to the contract of employment.

Since the maxim, when applicable, is a common-law defense to an action by a stranger, it is recognized by the English courts as a defense to that extent under the English statute. *Smith* v. *Baker*, A. C. 325; *Thomas* v. *Quartermaine*, 18 Q. B. D. 685; *Yarmouth* v. *France*, 19 Q. B. D. 647; *Osborne* v. *London, etc., R. Co.*, 21 Q. B. D. 220; *Williams* v. *Birmingham, etc., R. Co.*, 2 Q. B. 338.

The established doctrine of the English courts is, however, that the maxim is not synonymous with *"scienti non fit injuria,"* and that whether or not the servant *voluntarily* assumed the risk is a question of fact for the jury—a doctrine which is being accepted by the American courts. *New York, etc., R. Co.* v. *Vizvari*, 126 C. C. A. 632, 210 Fed. 118, 55 L. R. A. n. s. 1915-C, 9.

The maxim, *volenti non fit injuria*, has in the law no independent field of operation. It covers no ground not covered by contractual assumption of risk and contributory negligence. *O'Maley* v. *South Boston, etc., Co.*, 47 L. R. A. 161, and notes III and IX; 3 Labatt's M. & S. (2d ed.), secs. 1287-88. With the "displacement" of the two common-law defenses of contractual assumption of risk and contributory negligence under the Act of Congress, the maxim is also displaced.

The Federal Employers' Liability Act does not create in favor of employees of interstate carriers merely the common-law right of action of a stranger to the contract of employment. Differing materially in this respect from the English act, it creates in favor of such employees a right of recovery which can not at common law accrue to any

other class of persons. It imposes in favor of such employees absolute liability for injury "resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence" in its physical appliances therein enumerated.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted:

1. That under the common-law rule, the plaintiff is not chargeable with assumption of risk, since he was ignorant of the danger from which he suffered.

2. That if he were chargeable with knowledge of the danger, that fact would not bar a recovery under the Act of Congress, and could be considered only in mitigation of damages.

3. That there was no error committed by the circuit court on the first trial in giving plaintiff's instruction No. 2 or in refusing defendant's instruction A.

4. That upon the law and evidence the judgment of the circuit court in favor of the plaintiff on the first trial is plainly right, and should have been affirmed by the Supreme Court of Appeals.

5. That both judgments of the Supreme Court of Appeals and the judgment of the circuit court on the second trial should be reversed.

6. That the judgment of the circuit court in favor of the plaintiff on the first trial should be re-instated and affirmed by this Honorable Court.

7. That if for any reason the plaintiff is not entitled to an affirmance of the judgment in his favor on the first trial, he is at all events entitled to a reversal of the judgment for the defendant on the second trial, for the errors committed by the circuit court in giving defendant's in-

struction A and refusing instructions 3, 4, 5 and 6, requested by him, and because the verdict on that trial is contrary to the law and the evidence.

Respectfully submitted,

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By Counsel.

EDWARD P. BUFORD,

COUNSEL FOR PLAINTIFF IN ERROR.

September 16, 1915.

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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1915.

RALPH B. JACOBS, PLAINTIFF IN ERROR,

v.

SOUTHERN RAILWAY COMPANY, DEFENDANT IN ERROR.

No. 326.

ON WRIT OF ERROR TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

The decision of the Court of Appeals (R. p. 76, *et seq.* 116 Va. 189) establishes in favor of the plaintiff these two propositions:

1. That the defendant at the time of the accident was engaging in interstate commerce, and that the plaintiff was employed by it in such commerce; and

2. That the jury, on the first trial, properly found *as a matter of fact*, that the cinder pile alongside the tracks

of the defendant constituted "a defect due to its negligence."

Since the defendant does not assign cross-error with respect to these rulings, we assume (a) that their correctness is conceded, and (b) that they have the force of *res judicata* in this court.

The defendant's sole contention is that the Court of Appeals committed no error in holding that instruction "A" was improperly refused on the first trial and was properly given on the second—in other words, that the facts hypothetically stated in that instruction, *as a matter of law*, constitutes common-law assumption of risk; and that this common-law defense is available as a bar to recovery, under the act of Congress, notwithstanding the injury was occasioned by a *defect due to defendant's negligence.*

On behalf of the plaintiff it is submitted, with deference:

1. That instruction "A" does not correctly state the common-law doctrine;

2. That, under the facts disclosed by the record, assumption of risk cannot be made an issue; and

3. That assumption of risk cannot defeat recovery, under the act of Congress, when the injury results from the negligence of the defendant or any of its officers, agents or employees.

Common-Law Assumption of Risk.

The doctrine of assumed risk as developed and applied in Virginia is not in harmony with the doctrine as applied by this court. In Virginia the exercise by the servant of "ordinary care" to discover dangers is made the test. *Sheeler* v. *C. & O. Ry. Co.*, 88 Va. 188; *Clinchfield Coal Co.* v. *Wheeler*, 111 Va. 265, 275. In this court, the rule is that "upon this question the true test is not in the exercise of care to discover dangers." *Choctaw, &c. Ry. Co.* v. *McDade*, 191 U. S. 64, 40 L. ed. 96-100.

In support of the proposition just stated, that the rule in Virginia is not in harmony with the rule applied by this court, we quote the following extracts from the Virginia cases:

> "'If the servant, before he enters the service, knows, or if he afterwards discovers, or if, by the exercise of ordinary observation or reasonable skill and diligence in his department of service, he may discover, that the building, premises, machine, appliance, or fellow-servant in connection with which or with whom he is to labor is unsafe or unfit in any particular; and if, notwithstanding such knowledge, or means of knowledge, he voluntarily enters into or continues in the employment, without objection or complaint, he is deemed to assume the risk of the danger thus known or discoverable, and to waive any claim for damages against the master, in case it shall result in injury to him.'" *Sheeler* v. *C. & O. Ry. Co., supra.*
>
> "A servant, when he enters the service of the master, assumes all the ordinary risks of such service, and also as a general rule assumes all risks from causes which are known to him, or should be readily discernable by a person of his age or capacity, in the exercise of ordinary care." *Clinchfield Coal Co.* v. *Wheeler, supra.*

In contrast with the Virginia doctrine, in the case of *Texas & P. Ry. Co.* v. *Archibald*, 170 U. S. 655, this court said:

> "These requests the court gave, except in the first it omitted the words therein italicized, that is, 'by the exercise of ordinary care could have known,' and the second, 'or could have known it by the exercise of ordinary care.' The court was clearly right in striking the words from the requests."

Instruction "A" applies to cases arising under the act of Congress a more drastic rule than had been applied by the State court in cases controlled wholly by common-law principles. While containing the intimation that there was *no* danger, it in effect charges the employee with assumption of risk, *as a matter of law*, whenever *any* danger exists—whether known or unknown, obvious or latent, remote or imminent—if only he has knowledge, or an opportunity to acquire knowledge, of the physical condition from which the danger results. It tells the jury also that this defense is permitted by the act of Congress.

Since the employee's assumption of the risk of an abnormal danger due to the employer's negligence, as distinguished from his contributory negligence with respect to such danger, rests upon the implication of *contract*, actual knowledge of the danger is essential to warrant such an implication. The employee cannot contract with respect to a danger, of the existence of which he is in fact ignorant. Accordingly, the rule of this court is that actual knowledge of the *danger* must be shown, or, in the absence of positive evidence on the subject, its obvious character must be so conclusively established that, as a matter of fact, his knowledge must be presumed, before the doctrine of assumption of risk can be invoked.

Texas & P. Ry. Co. v. *Archibald*, 170 U. S. 655, 42 L. ed. 1188, 18 Sup. Ct. Rep. 777, *Choctaw* v. *McDade*, 191 U. S. 64, 48 L. ed. 96-100; *Seaboard Air Line* v. *Horton*, 233 U. S. 492, *Yazoo & Miss. V. P. R. Co.* v. *Wright*, 33 Sup. Ct. Rep. 130.

For further objections to this instruction as a statement of the common law we refer, without repetition, to the opening brief for the plaintiff (pp. 20-24).

On pages 4 and 5 of their brief, counsel for defendant make this contention:

> "The court of last resort in Virginia having declared the instruction to be a correct exposition of

> the common law doctrine of assumption of risk and this being a question which involves neither the Constitution of the United States nor any law made in pursuance thereof, the ruling and decision of the court of last resort in Virginia is final and binding on this court."

This contention is untenable. Assumption of risk is a matter of general, not local, jurisprudence. Before the enactment of the Employers' Liability Act—while the subject was "within the police power of the State in the absence of legislation by Congress"—this court applied its own interpetation of the common-law principle. In *Smith* v. *Alabama*, 124 U. S. 465, 31 L. ed. 508-512, it is said:

> "There is no common law of the United States, in the sense of a national customary law, distinct from the common law of England as adopted by the several states each for itself, applied as its local law, and subject to such alteration as may be provided by its own statutes. *Wheaton* v. *Peters*, 33 U. S. 8 Pet. 591. A determination in a given case of what the law is may be different in a court of the United States from that which prevails in the judicial tribunals of a particular State. This arises from the circumstance that the courts of the United States, in cases within their jurisdiction, where they are called upon to administer the law of the State in which they sit or by which the transaction is governed, exercise an independent though concurrent jurisdiction, and are required to ascertain and declare the law according to their own judgment. This is illustrated by the case of *N. Y. Cent. R. R. Co.* v. *Lockwood*, 84 U. S. 17 Wall. 357, where the common law prevailing in the State of New York, in reference to the liability of common carriers for negligence, received a different interpretation from

> that placed upon it by the judicial tribunals of the State; but the law as applied was none the less the law of that State."

By the act of Congress the subject is withdrawn from the police power of the State. *Mondou* v. *New York, &c. Ry. Co.*, 223 U. S. 1. The common law, as well as the legislation, of the State is effectually displaced, and all questions involving the application of the act are purely *federal.* Besides, as we have seen, the instruction, in express terms, is made the court's construction of the act of Congress. Its language is: "the act of Congress approved April 22, 1908, permits this defense, and the jury should find their verdict for the defendant."

Another complete answer to the defendant's contention, that instruction "A" is the law of the State and therefore binding on this court, is that there is *no such law of the State.* In Virginia, by constitutional provision as well as by statute (opening brief for plaintiff in error, p. 42, *et seq.*) common-law assumption of risk has been abolished as to railroad employees whether engaged in interstate or intrastate service. Indeed, in the opinion filed in this case, the learned president of the Court of Appeals quotes the provision of the State Constitution, "which," he declares, "wholly destroys the defense of assumed risk as applied to railroad employees." It is obvious, therefore, that instruction "A" is not the law of the State. It is not the law of this court; it is not the law of Congress. It is a legal "waif." *Durand* v. *New York & L. B. R. Co.*, 48 Atl. 1015.

A further answer to defendant's contention is, that if assumption of risk had not been abolished in Virginia as to railroad employees, and instruction "A" could otherwise be regarded as the law of the State, still Congress having acted upon the subject the act cannot be pieced out or controlled by the law of the State. *Michigan C. R. Co.* v. *Vreeland*, 227 U. S. 59.

Assumption of Risk Not An Issue in this Case.

In the case at bar the plaintiff was in no way concerned with or responsible for the existence of the cinder pile upon defendant's yard. As a locomotive fireman he was not charged with any duty regarding the disposition of the cinders, nor in fact with any duty requiring him to give personal attention to the condition of the tracks. *Texas P. R. Co.* v. *Harvey*, 228 U. S. 319-21; *Kirbo* v. *Southern Ry. Co.* (Ga.), 84 S. E. 491; *Baltimore & Ohio R. Co.* v. *Whiteacre* (Md.), 92 Atl. 1060.

His observation of the condition created by the pile of cinders, whatever such observation may have been, was at best but casual. His own testimony, which is all in the record on the subject, shows merely that he knew of the habit of discharging cinders on the yard, and that he "noticed it a day or two before" and it was larger than usual. There is no evidence that he ever had occasion to examine this accumulation or had any knowledge of the *latent* danger which resulted from the looseness of the mass. His positive testimony is that he did not know there was any danger:

> "Q. Were you conscious, when you started to get on that engine, of any danger to you from coming in contact with this pile of cinders? A. No, sir.
>
> "Q. Was it in your mind at all? A. No, sir.
>
> "Q. Did you know that there was a pile of cinders there? A. I had a knowledge of it, of the cinders being there, but I did not know that it was dangerous. I had forgotten them being there at the time. I was watching when I was going to get on the engine—watching my feet, where I was going to step, and was not noticing the cinder pile.
>
> "Q. That was not in your mind, as I understand it? A. No, sir; it was not in my mind" (R. p. 55-6).

With no evidence to contradict this testimony of the plaintiff, with every inference corroborating his statement, and without a fact from which his knowledge might even remotely be presumed, the defendant cannot make common-law assumption of risk an issue in the case. In no conceivable view of the evidence would the jury have been warranted in any other conclusion than that the plaintiff, a locomotive fireman, charged only with duties connected with the operation of the train, inadvertently came in contact with a danger, of the existence of which he had no knowledge. On these facts, the court may say, *as a matter of law*, he did not assume the risk. *Yazoo & Miss. V. R. Co.* v. *Wright*, 35 Sup. Ct. Rep. 130.

Assumption of risk in the sense of an affirmative defense relied upon by the master to relieve himself from liability for his own *negligence* is dependent wholly upon the servant's knowledge of the existence of the danger. Without such knowledge there can be no assumption of risk.

To charge the servant with assumption of risk the evidence (1) must show that he was "chargeable with knowledge of the material conditions which were the immediate cause of his injury," and (2) must establish his "appreciation of the dangers produced by the abnormal conditions."

> "That this is the alternative and crucial element upon which the defense depends is sufficiently apparent from the terminology by which it is described. * * * Any charge which may lead the jury to suppose that the defense of assumption of risk is available to the master if the servant was aware merely of the existence of certain abnormal conditions is a misdirection." 3 Labatt's M. & S. (2nd ed.), 1190, pp. 3207-3211.
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> "Before the defense of assumption of risk can be invoked, it must appear that the plaintiff appreciated the full extent of the danger to which he was

subjected." *Graseth* v. *Northwestern Knitting Co.*, 150 N. W. 804.

Even though he were vaguely aware of the existence of the accumulation of cinders spread over a portion of the yard, and had deliberately elected—as was not the case—to walk upon its surface, he cannot be charged with assumption of risk in failing to anticipate that it was of a dangerous consistency. He was not bound to anticipate the negligence of the servants of the defendant in leaving it in such a condition as to become a dangerous impediment to him.

"He did not anticipate, and as a matter of law was not required to have anticipated that negligence. * * * He had a right to rely upon the exercise of commensurate care on defendant's part in exposing either persons or property to unnecessary and great peril through so dangerous an instrumentality * * * (*Campbell* v. *Chicago, &c. Ry. Co.*, 108 Minn. 104, 121 N. W. 429), as a mass of loose and yielding cinders capable of ensnaring the feet of its employees. Indeed, he had a positive right, in the absence of knowledge of their dangerous character, to assume that as the cinders had been suffered by it to remain at the side of the tracks, the defendant had duly ascertained that the mass was sufficiently compact to afford him a safe footing; and that, had the accumulation involved a danger to the employees as they went about their work in the yard, it would not have been suffered by the defendant to exist.

In *Baltimore & Ohio Ry. Co.* v. *Whiteacre*, 92 Atl. 1060-1064, decided by the Supreme Court of Maryland under the federal act, on January 6, 1915, after the first decision of this court in *Seaboard Air Line Railway* v. *Horton*, it is said:

> "Did the plaintiff, Mr. Whiteacre, assume the risk? The rule has been frequently laid down, both in this State and elsewhere, upon this subject, and

is well stated in the case of *Wood* v. *Heiges*, 83 Md. 257, 34 Atl. 872, that a person assumes all risk of all dangers which are open and obvious, but not dangers which arise from the negligence of the master, unless after knowledge of such danger the servant continues with full knowledge to perform his work. The rule was given its fullest application in *Seaboard Air Line R. R.* v. *Horton*, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. ed. 1062, where the guard glass over the boiler gauge in the cab of the locomotive was missing, and was reported as missing by the engineer to his superior seven or eight days before the happening of the accident; and, though the missing guard glass was not supplied, the engineer continued to run his engine, and was injured by the bursting of the gauge, and the engineer was held, by continuing to work without the replacement of the guard glass, to have assumed the risk incident to its absence. And a similar case is that of *Byers* v. *Coal Co.*, 230 Pa. 10, 79 Atl. 157, although in this latter case the act of Congress was in no way involved. (See, also, *So. Ry.* v. *Crockett*, 234 U. S. 730, 34 Sup. Ct. 897, 58 L. ed. 1564.) In the case under consideration the plaintiff had been into the Cumberland yard in connection with his work on a number of occasions, certainly once at night, and knew or must have known of the existence there of the cinder pit; but the performance of his duties was not at the cinder pit, nor was he necessarily placed in the position with relation to it where he must be construed by law to have known whether it was a dangerous appliance or not, and he had the right to assume that, as constructed, it was a proper and safe appliance. Upon this branch of the case the act of Congress has no application, because section 4 by its terms applies only in a certain class of cases, of which this is not one, and, if we

take the rules as applied in the State courts, the risks which are assumed by an employee are those incident to, or connected with, the work, which the employee performs, not those which may exist in other portions of the establishment or yard where he himself has no duties, and where he has the right to rely upon the master's having performed his entire duty.

In the case of *McCann* v. *Atl. Mills*, 20 R. I. 566, 40 Atl. 500, relied upon by the appellant, and which is the case most nearly approaching this in its facts, the court did say that 'it was the duty of the defendant (employer) to furnish' his employee drinking water, but the 'fact that it was not so furnished' does not 'warrant the plaintiff in wandering about the yard in the darkness in search of it, at any one's risk except his own.' The court, however, in deciding the case, places its decision, not upon the assumption of risk, but on the contributory negligence of the plaintiff. So in this case the act of the plaintiff in going about the yard as he did was one to be viewed rather as contributory negligence than an assumption of risk, and that aspect of the case was fully and properly covered by the plaintiff's third prayer."

The declaration charges that the presence of the pile of cinders was due to the negligence of the defendant "through its agents, servants and employees, other than the plaintiff," in causing the cinders to be placed alongside and in dangerous proximity to its railroad track.

It is apparently conceded in the brief for the defendant in error, and is certainly so held by the jury and the courts below, that the evidence sustains this charge of negligence.

All courts agree that assumption of risk is not available as a defense when the injury results in whole or *in part* from the negligence of the "officers, agents, or employees"

of the carrier, as distinguished from a "defect or insufficiency" due to *its* negligence in its physical appliances. *Mondou* v. *New York, &c. Ry. Co.*, 223 U. S. 1; *Easter* v. *Virginian Ry. Co.* (W. Va.), 86 S. E. 37; *Portland, &c. Co.* v. *Jarvis* (C. C. A.), 227 Fed. 8; *Grybowski* v. *Erie Ry. Co.* (N. J.), 95 Atl. 764. In the case last cited it said:

> "The third ground upon which the defendant rested its motion was that the plaintiff was barred from a recovery because her husband had assumed the risk of the accident which produced his death. This ground, also, we think, is without substance. The doctrine of assumption of risk has no application to such risks as arise solely and directly out of the negligent acts of fellow servants. And if it did so apply, as a general rule, it would have no pertinence in the case of accidents the right of recovery for injuries arising out of which is regulated by the federal statute; for to so hold would be to nullify the declaration of Congress that every common carrier by railroad engaged in interstate commerce shall be liable in damages to the personal representative of any employee who shall lose his life while employed in such commerce, when his death results 'from the negligence of any of the officers, agents or employees of such carrier.'"

As a matter of fact, it is submitted that the plaintiff's injury resulted from the negligence of "officers, agents or employees" of defendant within the meaning of the first section of the act, and therefore there can be no defense of assumption of risk.

As a matter of law, it is submitted that whether the injury resulted in whole or in part from negligence of defendant's "officers, agents or employees" or from a "defect or insufficiency" due to *its* negligence, the defense is not available; that the cause of action for injury in either

aspect cannot be defeated by assumption of risk without, to that extent, nullifying the act; that when *actionable negligence,* of either "officers, agents or employees" or of the defendant with respect to its appliances, is causally related to the injury the liability is absolute, but subject to mitigation on account of contributory negligence; and there is no *defense in bar. Grand Trunk Ry. Co.* v. *Lindsay,* 120 C. C. A. 166, affirmed 233 U. S. 42.

COMMON-LAW ASSUMPTION OF RISK NOT A DEFENSE UNDER ACT OF CONGRESS.

The Court of Appeals, in the opinion delivered by its learned president (R. p. 76), says:

> "To the act, then, we must look for the law governing the liability of railroads and their employees *inter sese,* and in order to determine their relative privileges, duties and obligation. It in itself and of itself constitutes the sole and supreme law as to the subjects upon which it touches, and is not to be pieced out by reference to State legislation."

This is a correct statement. The court's conclusion is a *non sequitur.* Having declared that the act "in itself and of itself constitutes the *sole* and supreme law," the court proceeds to apply common-law assumption of risk to defeat the action. If, as is undoubtedly true, the act of Congress is the "*sole* and supreme law" upon the subject, the common law can have no force as a rule of decision in cases arising under the act.

Again, after correctly stating that the act "is not to be pieced out by reference to State legislation," the court proceeds to piece it out with the doctrine of assumption of risk, which, while in force in Virginia, owed its existence wholly to *State legislation.*

> "The common law of England, so far as it is not repugnant to the principles of the bill of rights and Constitution of this State, shall continue in full force within the same, and be the rule of decision, except in those respects wherein it is or shall be altered by the General Assembly." Code of Virginia, section 2.

Can it be successfully maintained that, while the act cannot be pieced out by remedial State legislation abolishing assumption of risk, it may be pieced out by State legislation adopting that doctrine—and that too after the doctrine has been abolished?

> "The common law did not become a part of the laws of the states of its own vigor. It has been adopted by constitutional provision, by statutes or decision, and, we may say in passing, is not the same in all particulars in all the states. But however adopted, it expresses the policy of the State for the time being only, and is subject to change by the power that adopted it. How, then, can it have an efficacy that the statute changing it does not possess?" *W. U. Tel. Co.* v. *Commercial Milling Co.*, 218 U. S. 406.

Since common-law assumption of risk has been abolished in Virginia as to railroad employees (*Norfolk & W. Ry. Co.* v. *Cheatwood*, 103 Va. 336; *Southern Ry. Co.* v. *Blandford*, 105 Va. 373; *Southern Ry. Co.* v. *Jacobs*, 116 Va. 189), there is no State common law on the subject. If there were it could not piece out the act of Congress.

There is no common law of the United States, except that in the construction of the Constitution and acts of Congress recourse may be had to the common law for the purpose of interpreting the technical terms employed, which otherwise would be unintelligible. *Wheaton* v. *Peters*, 8

Pet. 658; *Pennsylvania* v. *Wheeling*, 13 How. 563; *Smith* v. *Alabama*, 124 U. S. 465-83; *Moore* v. *United States*, 91 U. S. 279; *Gatton* v. *Chicago*, 28 L. R. A. 556; *United States* v. *Wong Kim Ark*, 169 U. S. 649; *Parkersburg, &c. R. Co.* v. *Parkersburg*, 107 U. S. 691; *Colorado* v. *Kansas*, 206 U. S. 46; *Western U. T. Co.* v. *Commercial Milling Co.*, 218 U. S. 406. The common law applied in *Western U. T. Co.* v. *Call*, 181 U. S. 92, 45 L. ed. 765-70, was the common law of the states in which the transaction occurred, which was in *full force* and unrepealed by State legislation.

There is, therefore, no federal common-law principle of assumption of risk. The principle as applied by the federal courts before the enactment of the present statute was the common law of the states, not a *national* doctrine. If there were such a *national* doctrine, it would be beyond the power of the states to modify or repeal. Yet the power of the states to abolish common-law assumption of risk is universally recognized, notwithstanding the benefit accrues to interstate as well as intrastate employees. As a principle of the common law owing its authority to its adoption by the State, it is subject to repeal by the State. Since its repeal by the State it is wholly inoperative as a principle of the common law.

The act of Congress being the sole and supreme law upon the subject, the defenses permissible under the act must be found in the express or implied provisions of the act. The question, therefore, is not whether the common-law defense of assumption of risk, *as such*, is available to the interstate carrier; but whether it appears from the terms of the act that Congress intended to *create*, in favor of the carrier, a defense similar to that of common-law assumption of risk of the *carrier's negligence*.

The fourth section of the act of Congress is the one relied upon as authority for the contention that common-law assumption of risk of the carrier's *negligence* is available to defeat recovery for the unconditional liability imposed by the first section. The contention is that under

the influence of the maxim "*expressio unius exclusio est alterius*," the language of the fourth section, "* * * such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury * * *," puts in operation again the doctrine of common-law assumption of risk of the employer's negligence, notwithstanding its abolition by the State.

Without pausing to repeat that, if the doctrine had not been abolished by the State it could not piece out the provisions of the act, it is submitted that the contention rests upon a mistaken view of the effect and purpose of the fourth section.

The purpose of the fourth section was not to nullify the other provisions of the act but to extend the liability created by the first section, by striking from the category of "risks of employment" the violation of statutes enacted for the safety of employees.

The key to the construction of this section is to be found in that line of authorities of which *Glenmont L. Co.* v. *Roy*, 61 C. C. A. 506, is perhaps the most conspicuous, which hold that, in the absence of express statutory provision, the violation by the employer of statutes enacted for the safety of employees is not actionable negligence; that for such violation the employer incurs criminal liability for the *penalty*, but does not incur civil liability for damages to the employee injured; and that such violation of a statute enacted for the safety of employees, not being negligence *quoad* the employee, the danger created by such violation remains a "risk of his employment"—a normal risk assumed by virtue of the original contract of employment.

Under the doctrine of *Glenmont L. Co.* v. *Roy*, and similar cases, notwithstanding the violation by the employer of a statute enacted for the safety of employees, it was still incumbent on the employee to establish negligence in

accordance with the common-law standard of duty, which does not require the use of specific statutory appliances but merely the exercise of ordinary care to provide reasonably safe appliances.

In the following extract from the opinion in that case, will be found the doctrine against which the fourth section of the act was directed, and which, emanating from the eminent jurists who concurred in the opinion, had to be displaced by legislative enactment in order to give full effect to the remedial policy evinced in every provision of the act of Congress:

> "The master is not required to supply the best, newest or safest appliances to secure the safety of his servants; nor is he bound to insure the safety of the place or of the appliances he furnishes. His duty in this respect is discharged when he has exercised ordinary care to furnish a place and appliances reasonably safe and suitable for the use of his employees. * * * The factory act of Minnesota which requires employers to guard or fence dangerous machinery so far as possible, does not abolish the defense of assumption of risk. It does not deprive parties of their right to contract regarding the risks of their avocations." *Glenmont L. Co.* v. *Roy*, 126 Fed. 524, 61 C. C. A. 506.

In the case just quoted the non-liability of the employer was placed upon the *absence* of actionable negligence—not upon the ground of assumption of risk of such actionable negligence. It was held that, inasmuch as the question of negligence was to be determined with reference to the common-law standard of duty, the employer, in the absence of express statutory provision, could not be charged with actionable negligence in favor of the employee injured as a result of the violation of a statute enacted for his safety unless he was guilty of some breach

also of common-law duty, which would involve an independent inquiry.

To the same effect are many other cases, among which is *Nottage* v. *Sawmill Phoenix*, 133 Fed. 976, which involved the Safety Appliance Act of Washington, imposing a penalty for its non-observance but containing no provision similar to that of the fourth section of the act of Congress. In that case the court said:

> "This is a penal statute, enacted by the legislature in the exercise of the police power of the State, and it contains no provision purporting to affect in any way the rules of law applicable to civil actions. It gives no hint of an intention to confer upon injured employees any new right enforceable in an action to recover damages, nor does it express a legislative intent to change the common law by abolishing defenses recognized by the common law."

The words of the fourth section "risks of his employment" mean the risks normally incident to the employment, the existence of which does not charge the employer with actionable negligence. They do not include risks occasioned by the employer's negligence. *Railway Co.* v. *Kelly*, 98 Tex. 123, 8 S. W. 79; *Atchison T. & S. F. R. Co.* v. *Mills*, 188 S. W. 480; *New Omaha, &c. Elec. Co.* v. *Rambold*, 106 N. W. 213; *Stager* v. *Troy Laundry Co.*, 63 Pac. 645, 53 L. R. A. 459-61; 5 Labatt's M. & S. (2d ed.), sec. 1647; 3 Labatt's M. & S. (2d ed.), sec. 894; *Morgan* v. *Vale of Neath R. R. Co.*, 5 Best. & S. 570, 35 L. J. Q. B. n. s. 260, affirmed in L. R. 1 Q. B. 149; *Texas P. R. Co.* v. *Harvey*, 228 U .S. 319-21; *Howard* v. *Delaware, &c. Ry. Co.*, 6 L. R. A. 75, note. It is obvious, therefore, that the fourth section has no reference to the common-law doctrine of assumption of risk of the employer's negligence, and that the maxim *"expressio unius exclusio est alterius"* is in no way involved in the construction of its language.

When it is considered that the first section imposes liability only for *negligence*, the purpose of the fourth section to extend that liability becomes apparent. The word "negligence" is a common-law term. It is therefore to be construed according to its common-law meaning. The act does not make the carrier an insurer of its employees' safety. By the first section it makes the carrier unconditionally liable for the *negligence* of its officers, agents or employees, and for its *negligence* with respect to its appliances. The purpose of the fourth section was to prevent the carrier from escaping liability imposed by the first section by interposing as a defense that, under the authorities just quoted, its violation of statutes enacted for the safety of employees, did not charge it with *negligence* within the purview of the first section.

There is another view of the question we desire to present.

The Liability Act of June 11, 1906, is constitutional so far as it applies to common carriers engaged in trade or commerce in the District of Columbia or in any territory of the United States. *El Paso & N. E. R. Co.* v. *Gutierrez*, 215 U. S. 87, 54 L. ed. 106.

In *Philadelphia, &c. Ry. Co.* v. *Tucker*, 33 App. Div. 123, affirmed by this court (220 U. S. 605), it was held that assumption of risk was abolished by the third section of that act. The eighth section of the act of April 22, 1908, preserves to employees all rights under the act of June 11, 1906. Consequently, the defendant's contention results in this anomaly, that recovery cannot be defeated by assumption of risk in the district or territories but may be defeated in the several states.

It is apparent from the identity of the language of the first and second sections, as well as from all other provisions, of the act of 1908, that Congress intended to secure to interstate employees within the States exactly the same rights and remedies as those secured to employees "in the territories, the District of Columbia, the Panama Canal

Zone, or other possessions of the United States." It is apparent that Congress intended to afford to all such employees identical and equal protection, whether its authority to afford that protection is to be referred to its power to regulate commerce between the states or to its plenary power to legislate with respect to the district, territories or possessions of the United States. Its purpose, as declared by Senator Borah, was to radically change those rules of the common law "so far as the power of Congress can extend." It was not the purpose of Congress that employees operating within the several states should occupy under the law a less favorable position than those operating within the district, the territories, the canal zone, or other possessions. A rule operating uniformly in every locality within the jurisdiction of the United States—not one law for the states and another law for the possessions—was the purpose of Congress. *"Non erit alia lex Romae, alia Athenis, alia nunc, alia posthac, sed et apud omnes gentes, et omni tempore, una eademque lex obtinebit."*

The language of the third section of the act of 1906, which *abolishes* assumption of risk within the district and territories, is:

> "That no contract of employement, insurance, relief benefit, or indemnity for injury or death entered into by or on behalf of any employee * * * shall constitute any bar or defense to any action brought to recover damages for personal injuries to or death of such employee."

The fifth section of the act of 1908 should receive a broader interpretation in favor of the employee, whether injured in the states, in the district, or territories:

> "That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself

> from any liability created by this act, shall to that extent, be void."

If Congress had not intended to include the "contract of employment" in the condemnation of the fifth section, would it have adopted the language "any contract * * * whatsoever"? Is it to be supposed that Congress intended to permit the carrier, *within the states*, to accomplish by the "contract of employment" what it is forbidden to accomplish by "any contract, rule, regulation, or device whatsoever"?

The words "any contract * * * whatsoever" necessarily include the "contract of employment." The words "any contract," in a statute, without the addition of "whatsoever," include *every* contract, "whether written or verbal, express or implied." *McMurray* v. *Brown*, 91 U. S. 257, 23 L. ed. 321; *Richardson* v. *Norfolk & W. R. Co.*, 17 S. E. 195, 37 W. Va. 641; *Wilson* v. *Taylor*, 8 South. 149, 89 Ala. 368; *Mornan* v. *Carroll*, 35 Iowa, 22, 26; *Sprague* v. *Haines*, 68 Tex. 215, 216, 4 S. W. 371.

In the opening brief filed for the plaintiff in error are presented, what seem to us, other unanswerable reasons to show that the common-law defense of assumption of risk cannot defeat his recovery, and that the judgment rendered by the trial court in his favor on the first trial should be reinstated and affirmed by this court.

The learned counsel for defendant in error, in their brief, have not even attempted to answer our argument. The opinion of the Court of Appeals does not answer it. The language of the opinion, "the defendant in error "in support of this contention relies in part upon the precise form of the term used in the act, which does not speak of 'assumption of risks,' but uses the phrase, the employee shall not be held to have 'assumed the risks,'" shows that the questions really presented were in fact misapprehended by the court. The fact that these questions have not, in

any previous case, been presented for the determination of this court makes them *res integra* here.

We submit these questions with confidence and with less reluctance for the reason that the second decision of this court in *Seaboard Air Line Railway* v. *Horton*, shows that assumption of risk, in the present state of the law, is at most but a theoretical abstraction incapable of practical application consistently with the provisions of the third section of the act of 1908, which displaces contributory negligence as a defense in bar.

Respectfully submitted,

RALPH B. JACOBS, *Plaintiff in Error*,
By Counsel.

EDWARD P. BUFORD,
Counsel for Plaintiff in Error.

April 1, 1916.

19

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915

No. 326.

RALPH B. JACOBS, Plaintiff in Error,

vs.

SOUTHERN RAILWAY COMPANY,
Defendant in Error.

On a Writ of Error to the Supreme Court of Appeals of Virginia.

BRIEF FOR DEFENDANT IN ERROR.

SOUTHERN RAILWAY COMPANY,
Defendant in Error.
By Counsel

L. E. JEFFRIES,
W. L. WILLIAMS,
Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1915

No. 326.

RALPH B. JACOBS, Plaintiff in Error,

vs.

SOUTHERN RAILWAY COMPANY,
Defendant in Error.

ON A WRIT OF ERROR TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

BRIEF FOR DEFENDANT IN ERROR.

I.

Statement of the Case.

This is an action at law brought in the Circuit Court of Brunswick County in the State of Virginia by the plaintiff in error, Ralph B. Jacobs, against the Southern Railway Company, defendant in error, for the purpose of recovering damages on account of personal injury sustained while in the employ of the defendant. The facts of the case

essential to the proper consideration of the legal questions involved are, briefly, as follows:

The defendant, ever since the railroad had been built, had been in the habit of stopping its passenger trains at the head of the yard at Lawrenceville, Virginia, and drawing the fire-boxes, and afterwards causing the cinders to be thrown from between the rails on the side of the track, and allowed the cinders to so accumulate in piles of varying size until they amounted to a considerable quantity, and then to cause the same to be hauled away.

The plaintiff was a fireman employed by the defendant, and the undisputed evidence is to the effect that he had been so employed for more than a year prior to the accident, and was entirely familiar with the method of handling cinders at the point above referred to, and he testified himself that he had knowledge of the cinders being piled there, and that he knew of the habit of discharging the cinders, and had noticed the pile of cinders a day or two before the accident (See Record, pp. 55-59). He also says that he did not know that the pile of cinders was dangerous. The plaintiff was injured in the broad open day, while attempting to board a moving engine, with a water cooler under one of his arms.

The action was brought to enforce liability under the Act of Congress known as the Employers' Liability Act, and on being tried before a judge and jury, resulted in a verdict for $12,000.00 in favor of the plaintiff. From this judgment the defendant took an appeal to the Supreme Court of Appeals

of Virginia, which court reversed the lower court, and directed that certain instructions be given, which being founded upon the undisputed testimony in the case, settled it in favor of the defendant. The case was again tried before the judge and a jury in the Circuit Court, and that court giving the instructions declared to be right and proper by the Supreme Court of Appeals of Virginia, there was a verdict under these instructions and a judgment in favor of the defendant. The plaintiff thereupon applied to the Supreme Court of Appeals of Virginia for a writ of error, which was refused, and the plaintiff thereupon brought the case here.

II.

ARGUMENT

The case turns upon the validity of a certain instruction, marked "A," asked for by the defendant (See Record, p. 74). This instruction is as follows:

> "The Court instructs the jury that if they believe from the evidence that the existence of the cinder pile was known to the plaintiff, or that he had been working on the Southern Railway at Lawrenceville for more than a year, and that the cinders had been piled at the same place and in the way described by the witnesses for many years prior to the accident, and that the plaintiff had failed to show that he had made complaint or objection on account of the cinder pile, then he assumed the risk of danger from the cinder pile, if there was any danger in it, and the

> Act of Congress approved April 22nd, 1908, permits this defence, and the jury should find their verdict for the defendant."

This instruction was refused by the Circuit Court, and when the case reached the Supreme Court of Appeals of Virginia that court declared the instruction to be correct, and that it should have been given. The validity of this instruction is attacked upon two grounds:

First, upon the ground that it does not correctly state the common law doctrine of assumption of risk; and

Second, because the doctrine of assumption of risk as a defence has been abolished by the Act of Congress known as the Employers' Liability Act.

The Supreme Court of Appeals in discussing this instruction (See Southern Railway Co. v. Jacobs, 116 Va.199), says as follows:

> "Cases might be multiplied to any extent to show that the doctrine of assumed risk covers more than those risks which are ordinarily incident to the business and embrace the use of defective appliances and work of almost every description, where the employee, with knowledge of the defect, continued to use it without notice to the employer."

The court of last resort in Virginia having declared the instruction to be a correct exposition of the common law doctrine of assumption of risk, and this being a question which involves neither the Constitution of the United States nor any law made in pursuance thereof, the ruling and de-

cision of the court of last resort in Virginia is final and binding upon this court.

It is not necessary, however, to rely upon the rulings of the Supreme Court of Appeals of Virginia. This instruction in the particular now under discussion is in exact accord with the doctrine as laid down by the Supreme Court of the United States, and we will content ourselves by referring the court to the case of *Choctaw, Gulf, &c., R. Co., v. McDade,* 191 U. S. 64; 48 L. Ed., 96. At page 68 this court declares the doctrine as follows:

> "The servant has the right to assume that the master has used due diligence to provide suitable appliances in the operation of his business, and he does not assume the risk of the employer's negligence in performing such duties. The employee is not obliged to pass judgment upon the employer's methods of transacting his business, but may assume that reasonable care will be used in furnishing the appliances necessary for its operation. This rule is subject to the exception that where a defect is known to the employee, or is so patent as to be readily observed by him, he cannot continue to use the defective apparatus in the face of knowledge and without objection, without assuming the hazard incident to such a situation. In other words, if he knows of a defect, or it is so plainly observable that he may be presumed to know of it, and continues in the master's employ without objection, he is taken to have made his election to continue in the employ of the master, notwithstanding the defect, and, in such case, cannot recover."

To the same effect, see *Texas & Pac. R. Co., v. Archibald*, 170 U. S. 665.

No case, as far as we are aware, in this court, has modified or changed by so much as one jot or tittle the law laid down in the *McDade* case. Certainly the case of *Texas v. Swearingen*, 196 U. S. 51, does not do so, for that case, on page 62, clearly recognizes the rule that if the danger is open and obvious and the employee continues in the employment without objection, he cannot recover.

We come now to discuss the second ground upon which it is contended that the instruction is erroneous, namely, that the doctrine of assumption of risk as a defence to interstate carriers has been abolished by the Act of Congress known as the Employers' Liability Act.

This involves the proper construction of the fourth section, which is as follows:

> "In any action brought against any common carrier under or by virtue of any of the provisions of this act, to recover damages for injury to or the death of any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by said common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

By the terms of the act itself, assumption of risk is declared not to be a defence when the engligence complained of is a violation of some statute enacted for the safety of employees. The construction con-

tended for by the plaintiff is that the defence of assumption of risk has been entirely abolished by the act. Such a construction reads out of the act entirely Section 4, for if the doctrine had been abolished absolutely and in all cases, why should Section 4 be inserted saying that it should be taken to be abolished in a certain particular case, to-wit, when there had been a violation of some statute enacted for the safety of employees, etc.? The fair and reasonable construction of the act is to construe it as meaning what it says; namely, that the assumption of risk as a defence is abolished only where the negligence is in violation of some statute enacted for the safety of employees.

It would be idle at this day to cite authorities to support the contention that this case is not governed by the statute law or the constitution of the State of Virginia. We will cite some of the authorities in the state courts bearing on the construction of the Act.

The question came before the Supreme Court of Idaho in the case of *Neal v. Idaho*, 125 Pac. 341, and it was there said, referring to the Act of Congress approved April 22nd, 1908:

> "The provisions of Section 4 of said Act of Congress do not remove the defence of assumption of risk unless the injury or death of the employee was contributed to by the violation on the part of the common carrier of any statute enacted for the safety of employees."

The Supreme Court of Georgia has distinctly held that the defence of assumption of risk was not abol-

ished by the Act of Congress except in cases where the servant was injured by the violation by the master of some statute enacted for the safety of employees. See *Bowers v. Southern Ry. Co.*, 73 S. E. 679:

> "Assumption of risk is a good defence to an action under the Federal Employers' Liability Act except where the carrier's default consists in a violation of some statute enacted for the safety of employees, and such default has contributed to the injury or death of the employee."
>
> *Bocker v. Kansas City*, 129 Pac., 1151.

The court of last resort in Texas is to the same effect, saying:

> "In the absence of a statute affecting the rule, we think it is not to be doubted from the unquestioned facts that the appellee did assume the risk."
>
> *Freeman v. Powell*, 144 S. W. 1034.

The Circuit Court of Appeals for the First District decided that the doctrine of assumption of risk had not been abolished except in the particular case mentioned, and cites from the Employers' Liability Cases, 223 U. S. 1, as so deciding, the following language:

> "The rule that an employee was deemed to assume the risk of injury even if due to the employer's negligence where the employee voluntarily entered or remained in the

> service with an actual or presumed knowledge of the condition out of which the risk arose, is abrogated in all instances where the employer's violation of a statute enacted for the safety of his employees contributed to the injury."
>
> See *Central Vermont Ry. Co. v. Bethune*, 206 Fed., 868, at p. 876.

We respectfully submit that the question now under discussion is no longer an open one in this court, and we therefore will not continue the citation of further cases from other courts. The question has been decided by this court in the case of *S. A. L. Ry. Co. v. Horton*, 233 U. S., 492, decided April 27th, 1914. As we understand the brief of counsel for the plaintiff, he takes the position that the Horton case was wrongly decided, and should be reversed. At p. 501 this court said:

> "It seems to us that Section 4, in eliminating the defence of assumption of risk in the cases indicated, quite plainly evidences the legislative intent that in all other cases such assumption shall have its former effect as a complete bar to the action. And, taking sections 3 and 4 together, there is no doubt that Congress recognized the distinction between contributory negligence and assumption of risk; for, while it is declared that neither of these shall avail the carrier in cases where the violation of a statute has contributed to the injury or death of the employee, there is, with respect to the cases not in this category, a limitation upon the effect that is to be given to contributory

> negligence, while no corresponding limitation is imposed upon the defence of assumption of risk—perhaps none was deemed feasible."

Again in the same case, page 504, the court says:

> "But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to use due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employee is not treated as assuming until he becomes aware of the defect or dis-repair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them. These distinctions have been recognized and applied in numerous decisions of this court. (Citing numerous cases)."

This court had before the *Horton* case, practically decided the same question in the same way in the following cases:

Gulf, Colorado &c., Co., v. McGinnis, 228 U. S., 173;
Mondou v. N. Y., N. H. & H. R. Co., 223 U. S., 1;
M. K. & T. R. Co. v. Wulf, 226 U. S., 570;
S. A. L. R. Co. v. Moore, 228 U. S., 433.

The rulings of the Supreme Court of Appeals of Virginia in this case are in perfect harmony with

the decisions of this court, and we therefore ask that the judgment below be affirmed.

Respectfully submitted,

SOUTHERN RAILWAY COMPANY,
Defendant in Error.
By Counsel.

L. E. JEFFRIES
W. L. WILLIAMS
Counsel.

JACOBS *v.* SOUTHERN RAILWAY COMPANY.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

No. 326. Argued April 27, 1916.—Decided May 22, 1916.

Under § 4 of the Employers' Liability Act assumption of risk as a defense is abolished only where the negligence of the carrier is in violation of some statute enacted for the safety of employees; in other cases therefore it is retained.

An experienced employee, admittedly knowing the material conditions and presence of a pile of cinders who attempts to board a moving engine with a vessel of water in his hand, must be considered as appreciating the danger and assuming the risk although at the time he may have forgotten the existence of the cinders; and this is so even if the employer was negligent in allowing the cinders to remain. There being no violation of any safety statute, the common-law defense of assumption of risk is not eliminated in such a case by the Employers' Liability Act.

116 Virginia, 189, affirmed.

THE facts, which involve the construction and application of the contributory negligence provisions of the Employers' Liability Act, are stated in the opinion.

Mr. Edward P. Buford for the plaintiff in error.

Mr. William Leigh Williams, with whom *Mr. L. E Jeffries* was on the brief, for the defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Action under the Federal Employers' Liability Act, as amended. April 22, 1908, c. 149, 35 Stat. 65; April 5, 1910, c. 143, 36 Stat. 291.

Plaintiff in error, who was also plaintiff in the trial court and we shall so designate him, was in the service of

the railway company, in interstate commerce, as a fireman. He received injuries while attempting to get on a moving locomotive. He charged negligence against the company and sued for the sum of $20,000 damages. The negligence charged was the causing and permitting to be within dangerous proximity to the tracks of the company a pile of loose cinders over which plaintiff stumbled and slipped and was drawn under the locomotive.

The railway company, among other defenses, pleaded the following:

"That the said plaintiff was guilty of gross contributory negligence in attempting to board the engine with a water cooler filled with water in his arms, and was also guilty of gross contributory negligence in attempting to board the engine from a pile of cinders along the track; and was also guilty of gross contributory negligence in running along the track and in attempting to board the engine without looking and seeing the pile of cinders, which could have been observed with any caution and care on his part; that the said pile of cinders had been allowed to accumulate in the same manner and in the same place as they were at the time of the accident for many years prior to the accident, and that these facts were well known to the plaintiff, and that he assumed the risk of danger from said pile of cinders, if there was any danger in allowing them to remain there."

There were two trials of the action. The first trial resulted in a verdict for plaintiff for $12,000, upon which judgment was entered. The judgment was reversed by the Supreme Court of Appeals for error in the instructions.

Upon the second trial the verdict was for defendant. The court refused to set it aside and grant a new trial, but ordered judgment in accordance therewith. The Supreme Court of Appeals refused a writ of error and supersedeas, the effect of which was to affirm the judgment of the trial court.

The facts are practically undisputed. Plaintiff was engaged with a crew in shifting cars in the railway company's yard at Lawrenceville, Virginia. He descended from the engine at the depot to get drinking water for himself and the engineer. He returned with a can of water to mount the engine and then as to what took place he testified as follows: "I came down the railroad road . . . and came across the track on the crossing. At the time the train was pulling out of the last track. So I waited until the train was pulling up there, and aimed to catch it, and when I aimed to catch it I made three or four steps to get on it, you know, and I got to the cinder pile before I knew it, and I tripped, and went under the engine. . . . The cinder pile tripped me." The train was moving "just about as fast as anybody could walk, that is pretty peart walking; not over three or four miles an hour at the most." He further testified that it had been customary ever since he had been on the road "for the trainmen to get on and off the engine when it was going that way;" had seen it done hundreds of times a day and had never seen any rule forbidding it. He was about seven feet from the cinder pile when he "aimed to" catch the engine and the cinder pile was about eighteen or twenty-four inches deep and he indicated its length to be about as long as the court room and as wide as the distance from himself to a person he indicated. Describing how the cinders caused him to fall, he said they were piled "right up against the rail" and "sloped from the rail up. As I caught the engine, I made several steps, and as I hit the cinder pile they commenced miring just like mud, and it caused me to fall, and when I fell in the cinder pile the journal box kept hitting and I couldn't get up. I tried, but I couldn't. . . . Every time I made an effort the cinder pile gave way with me. . . . I fell down behind the cinder pile. The cinder pile was sloping, and I fell down by the journal box, and the train

was passing, and I rolled down next to the rail." He further testified that if he had fallen from some other cause he could have got out of danger and that when he started to get on the engine he was not conscious of any danger from coming in contact with the pile of cinders, that it was not in his mind at all. But he testified, "I had knowledge of it, of the cinders being there, but I did not know that it was dangerous. I had forgotten them being there at the time. I was watching when I was going to step on the engine—watching my feet, where I was going to step, and was not noticing the cinder pile. . . . It was not in my mind."

It is not disputed that it was customary and had been for eleven or twelve years for the ashpans of the engine to be cleaned upon the tracks and the ashes then drawn out from the tracks and, when a lot had accumulated, taken away. The piles were of irregular height.

Plaintiff contends that upon this evidence he was entitled to recover under proper instructions and that the trial court followed the decision of the Supreme Court of Appeals in giving an instruction at the second trial which it had refused to give at the first trial. The instruction is as follows:

"The Court instructs the jury that if they believe from the evidence that the existence of the cinder pile was known to the plaintiff, or that he had been working on the Southern Railway at Lawrenceville for more than a year, and that the cinders had been piled at the same place in the way described by the witnesses for many years prior to the accident, and that the plaintiff had failed to show that he had made complaint or objection on account of the cinder pile, then he assumed the risk of danger from the cinder pile, if there was any danger in it, and the Act of Congress approved April 22, 1908, permits this defense, and the jury should find their verdict for the defendant."

This instruction, it is contended, became "the law of the case" by the decision of the Supreme Court of Appeals and precluded the instructions which plaintiff asked and which otherwise would have been correct, it is insisted, and should have been given.

The instructions refused presented these propositions: (1) The unsafe character or condition of the railway was of itself no defense to the injury caused thereby. (2) Knowledge of it by plaintiff might constitute contributory negligence and diminish the amount of recovery. (3) If the company suffered or permitted the cinders to be placed and to accumulate alongside of its main line in dangerous proximity to the railroad track or road and plaintiff's injury resulted in whole or in part from such negligence, or if the cinders constituted a defect or insufficiency in the railroad track, the verdict should be for plaintiff. (4) Knowledge of the existence of the cinders would not bar recovery but it might be considered with other evidence in determining whether plaintiff was guilty of contributory negligence and, if guilty, recovery would not be barred but the amount of recovery would be diminished in proportion to such negligence. (5) To charge plaintiff with contributory negligence he must not only have known of the cinders but also the danger occasioned by them or that the danger was so obvious that a man of ordinary prudence would have appreciated it and not have attempted to get upon the engine at the time and under the circumstances disclosed by the evidence.

The rulings of the trial court and Supreme Court of Appeals upon the instruction given and those refused make the question here and represent the opposing contentions of the parties. The railway company contends that plaintiff's knowledge of the cinder pile and his conduct constituted assumption of risk and a complete defense to the action. The plaintiff, on the other hand, insists that such knowledge and conduct amounted, at the utmost,

to no more than contributory negligence and should not have barred recovery, though it might have reduced the amount of recovery. Indeed, plaintiff goes farther and contends that, whatever might have been the evidence respecting his knowledge or lack of knowledge of the danger, he did not assume the risk if the company was negligent; and, further, that employees' continuance in service with knowledge of a dangerous condition and without complaint does not bar recovery under the act of Congress. He concedes, however, that he encounters in opposition to his contentions the ruling in *Seaboard Air Line* v. *Horton*, 223 U. S. 492, and therefore asks a review of that case, asserting that "the considerations upon which the true construction of the act depends were not suggested to the court."

The argument to sustain the assertion and to present what he deems to be the true construction of the act is elaborate and involved. It would extend this opinion too much to answer it in detail. He does not express his contention in any pointed proposition. He makes it through a comparison of the sections of the act and insists that to retain the common-law doctrine of the assumption of risk is to put the fourth section in conflict with the other sections. The basis of the contention is that the act was intended to be punitive of negligence and does not cast on the employees of carriers the assumption of risk of any condition or situation caused by such negligence. This is manifest, it is insisted, from the provisions of the third section of the act which provides that the contributory negligence of the employee "shall not bar a recovery," and of the fifth section which precludes the carrier from exempting itself from liability. This purpose is executed and can only be executed, it is urged, by construing the words of § 4 (which we shall presently quote) to apply to "the ordinary risks inherent in the business—the unavoidable risks which are intrinsic not-

withstanding the performance by the carrier of its personal duties. They do not include the 'secondary and ulterior' risks arising from abnormal dangers due to the employer's negligence." And, further: "The object of this section was not to adopt by *implication* the common-law defense of assumption of risk of such abnormal dangers. Its object was in *express terms* to exclude the defense which, before the passage of the act, was available to the carrier in determining what are the 'risks of his employment' assumed by the employee."

These, then, are the considerations which plaintiff says were not submitted to the court in the *Horton Case* and which he urges to support his contention that assumption of risk has been abolished absolutely.

We are unable to concur. The contention attributes to Congress the utmost confusion of thought and language and makes it express one meaning when it intended another.

The language of § 4 demonstrates its meaning. It provides that in any action brought by an employee he "shall not be held to have assumed the risks of his employment in any case where the violation by said common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." It is clear, therefore, that the assumption of risk as a defense is abolished only where the negligence of the carrier is in violation of some statute enacted for the safety of employees. In other cases, therefore, it is retained. And such is the ruling in the *Horton Case*, made upon due consideration and analysis of the statute and those to which it referred. It was said: "It seems to us that § 4, in eliminating the defense of assumption of risk in the cases indicated, quite plainly evidences the legislative intent that in all other cases such assumption shall have its former effect as a complete bar to the action." And there was a comparison made of § 4 with the other

sections and the relation and meaning of each determined and the preservation by the statute of the distinction between assumption of risk and contributory negligence, which was pronounced "simple" although "sometimes overlooked." Cases were cited in which the distinction was recognized and applied (p. 504).

It is, however, contended that the conditions of the application of assumption of risk were not established and that "to charge a servant with assumption of risk the evidence (1) must show that he was 'chargeable with knowledge of the material conditions which were the immediate cause of his injury,' and (2) must establish his 'appreciation of the dangers produced by the abnormal conditions.'" The testimony of plaintiff is adduced to show that these conditions did not exist in his case.

He admitted a knowledge of the "material conditions," and it would be going very far to say that a fireman of an engine who knew of the custom of depositing cinders between the tracks, knew of their existence, and who attempted to mount an engine with a vessel of water in his hands holding "not over a gallon" could be considered as not having appreciated the danger and assumed the risk of the situation because he had forgotten their existence at the time and did not notice them. We think his situation brought him within the rule of the cases. *Gila Valley Ry.* v. *Hall*, 232 U. S. 94, 102.

It is objected, however, that instruction A, "viewed wholly with reference to common-law principles," is erroneous in that it omitted to state as an element the appreciation by plaintiff of the danger of the situation as necessary to his assumption of risk. But that objection was not made at the trial. The objection made was general, that the instruction did "not correctly state the common-law doctrine of assumption of risk." It was therefore very indeterminate, and we cannot say that the court considered that it was directed to the omission

to express or to bring into prominence the appreciation by plaintiff of the danger he incurred.

The instruction was refused by the trial court upon objection by plaintiff. It was considered by the Supreme Court of Appeals and plaintiff contended against it there only upon the ground that the assumption of risk was not available as a defense under the act of Congress. He made the contention there that he does here, and which we have already considered, that the act of Congress precludes the defense of assumption of risk of any condition or situation caused by the negligence of a carrier. And this was the full extent of plaintiff's contention. Had he made the specific one now made the Supreme Court of Appeals would have dealt with it, for the opinion of the court shows a clear recognition of the elements necessary to the doctrine of assumption of risk and the trial court as well must have understood them; and we cannot suppose that the court discerned in plaintiff's general objection the specification which he now contends was necessary and which it was error to refuse.

Judgment affirmed.